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No.

IN THE
Supreme Court of the United States

WILMER LEE SCURLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 3582(c)(2) of Title 18 of the U.S. Code authorizes a district court to reduce a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Under Federal Rule of Criminal Procedure 11(c)(1)(C), the Government and the defendant may enter into a plea agreement that asks the district court to impose a sentence based on a particular "sentencing range" or "a particular provision of the Sentencing Guidelines."

The question presented is whether a district court is barred from exercising its statutory power to reduce a sentence under § 3582(c)(2) solely because the court accepted a Rule 11(c)(1)(C) plea agreement.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wilmer Lee Scurlark respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is published at 560 F.3d 839 (8th Cir. 2009). The opinion of the district court (App., *infra*, 8a-10a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. On June 11, 2009, Circuit Justice Alito extended the deadline for filing a petition for a writ of certiorari up to and including July 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c) provides in relevant part:

§ 3582. Imposition of a sentence of imprisonment

. . . .

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

. . . .

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion,

the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Federal Rule of Criminal Procedure 11 provides in relevant part:

(c) Plea Agreement Procedure

(1) In General.

An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement.

The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement.

If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement.

If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement

and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

STATEMENT

This case presents a pure question of law that has divided the circuits: whether a district court has the power under 18 U.S.C. § 3582(c)(2) to reduce a sentence in cases where the court accepted a Rule 11(c)(1)(C) plea agreement.

The Eighth Circuit, in the decision below, held that a district court may never do so. The Third Circuit, in contrast, has held that a court *can* reduce a Rule 11(c)(1)(C) sentence, as long as the record demonstrates that the district court considered the Sentencing Guidelines when imposing it. The Sixth Circuit has also held that a court can reduce a Rule 11(c)(1)(C) sentence, but in a narrower set of circumstances — where the parties have expressly authorized the court to do so in the plea agreement.

Review is warranted to resolve this three-way split and to decide a pure question of federal law that is arising with great frequency in the federal courts in the wake of the amendments to the Guidelines for cocaine base, commonly known as crack cocaine.

1. In May 2006, Wilmer Scurlark was indicted in Minnesota federal court for attempted distribution of crack cocaine, possession with intent to distribute crack cocaine, and failure to appear. Soon after, he reached a plea agreement with the Government. Under that agreement, he pleaded guilty to one count of possession with intent to distribute crack cocaine, a Class C felony. *See* 21 U.S.C. § 841(a)(1),

(b)(1). The statutory maximum for that offense is 20 years. 21 U.S.C. § 841(b)(1)(C).

The plea agreement set forth the Sentencing Guidelines range that applied to Mr. Scurlark. The parties first agreed that the base offense level was 34 because it was undisputed that the offense involved 216 grams of crack. After other stipulated adjustments, the parties arrived at a total offense level of 31 and a criminal history category of II. Based on those Guidelines calculations, the agreement stated that the appropriate sentencing range under the Guidelines was 151 to 188 months. The parties further agreed that the Government would recommend a 40-percent downward variance from that range based on the totality of the circumstances, including Mr. Scurlark's post-offense rehabilitation, as provided for in 18 U.S.C. § 3553(a). (App., *infra*, 12a.)

The plea agreement stated that "[t]he defendant understands that he will be sentenced in accordance with the applicable Sentencing Guidelines under the Sentencing Reform Act of 1984." (App., *infra*, 13a.) The court emphasized that part of the agreement during the plea hearing. *Id.* at 33a. The agreement also invoked Federal Rule of Criminal Procedure 11(c)(1)(C), which states that a "plea agreement may specify that an attorney for the government will . . . agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." Rule 11(c)(1)(C) provided a single protection for Mr. Scurlark: Had the court decided to reject the sentence agreement, Mr. Scurlark would have been given the choice of withdrawing his guilty plea or proceeding with the plea and facing a sentence unrestricted by the terms of the agreement.

Rule 11(c)(5). This is the only feature distinguishing a plea agreement under Rule 11(c)(1)(C) from other plea agreements. *Cf.* Rule 11(c)(1)(B).

At the sentencing hearing, Mr. Scurlark's counsel explained that Mr. Scurlark had "a presumptive guideline range between 151 months and 188 months." (App., *infra*, 46a.) He then requested "that the Court start from the low end of the box at the 151-month mark, and that the variance of 40 percent be granted" from that starting point. *Id.* This would have resulted in a sentence of 91 months. He also encouraged the court "to even go further than the variance agreed to by the state." *Id.* The prosecutor, on the other hand, while agreeing that "the range that was suggested was 151 to 188" months, recommended "a variance from that of 40 percent or 68 months" (by starting at the top of the range), resulting in his suggestion that the court impose a sentence of 120 months. *Id.* at 50a.

The district court sentenced Mr. Scurlark on September 19, 2007: "[H]aving . . . reviewed the presentence investigation report" the Court "unconditionally accept[ed] the plea agreement, because it [wa]s satisfied that the agreement [did] adequately reflect the seriousness of defendant's offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing." (App., *infra*, 52a.) After considering the § 3553(a) factors, the court varied downward by 40 percent, as measured from the mid-point of the range, and sentenced Mr. Scurlark to 100 months in prison and three years of supervised release. *Id.* at 54a (finding that "in light of the considerations set forth in 18 United States Code, Section 3553(a), the sentence imposed is reasonable, appropriately reflects the seriousness of the offense, and provides just punishment"). Mr. Scurlark's projected release date is May 1, 2013.

2. The United States Sentencing Commission has long struggled with determining the appropriate relationship between sentences for crimes involving powder cocaine and those involving crack cocaine. Until recently, the Sentencing Guidelines called for subjecting a person who traffics in crack cocaine to the same punishment as one who traffics in one-hundred times as much powder cocaine. *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007). The Commission chose this approach because the same 100-to-1 ratio was used to set statutory mandatory minimums in the Anti-Drug Abuse Act of 1986. *Id.* at 565, 567.

After assessing more than a decade of district court experience applying that ratio, the Sentencing Commission concluded that the disparity between crack-cocaine and powder-cocaine sentences was unwarranted. *Id.* at 568. The disparity, the Commission said, "fails to meet the sentencing objectives set forth by Congress." *Id.* (quoting U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 91 (May 2002)).

The Commission's report was unsuccessful, however, in generating legislative change. In 1995, the Commission promulgated an amendment that would have eliminated the ratio under the Guidelines, but Congress passed legislation barring it from taking effect. *Id.* at 569. The Commission then issued additional reports in 1997 and 2002 urging Congress to change the law. *Id.* Finally, in 2007, the Commission once again recommended that Congress change the law, and at the same time it promulgated an amendment to the Guidelines that reduced the base offense level for crack-cocaine offenses by two levels, providing partial but significant relief from the disparity in many cases. *Id.* (citing Amendments to the Sentencing Guidelines for United States Courts, 72

Fed. Reg. 28,571–28,572 (2007)); *see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2008).

The Commission explained that "[c]urrent data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives." 72 Fed. Reg. 28,573. The Commission submitted the proposed amendment, Amendment 706, to Congress, and it became effective on November 1, 2007. The Commission then voted unanimously to make the change retroactive, effective March 3, 2008. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(c) (2008); 28 U.S.C. § 994(u); *see also* Press Release, U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/press/rel-121107.htm.

3. After the Sentencing Commission retroactively reduced the Guidelines range for crack-cocaine offenses, Mr. Scurlark filed a motion in the district court to reduce his sentence under 18 U.S.C. § 3582(c)(2). That provision authorizes a court to reduce a sentence "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

Amendment 706 reduced Mr. Scurlark's base offense level from 33 to 31, making the applicable Guidelines range 121 to 151 months, rather than 151 to 188 months. As noted above, Mr. Scurlark's original sentence resulted from a variance below the Guidelines range then in effect. Under the relevant policy statement governing § 3582(c)(2) motions, where the original term of imprisonment was less

than the term provided by the Guidelines range applicable to the defendant at the time of sentencing, "a reduction comparably less than the amended guideline range" determined under the policy statement "may be appropriate." U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(B) (2008). That variance would produce a new range of 73 to 91 months. Because the term of imprisonment imposed was 34 percent below the bottom of the Guidelines range applicable at the time of sentencing, "a reduction comparably less than the amended guideline range" would yield a sentence of 80 months, rather than the 100 months that Mr. Scurlark is currently serving. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b)(2)(B) & cmt. 3 (2008).[1]

The district court never had a chance to reach the question whether Mr. Scurlark's circumstances warranted a reduced sentence. Instead, the court felt compelled to deny the motion on a purely legal ground, holding that § 3582(c)(2) did not authorize it to reduce a sentence agreed to in a Rule 11(c)(1)(C) plea agreement. (App., *infra*, 9a-10a.)

The Eighth Circuit affirmed in a published opinion. The court held that a sentence imposed in the wake of a Rule 11(c)(1)(C) plea agreement can *never* be reduced under § 3582(c)(2). The court reasoned that § 3582(c)(2) applies only to sentences that are "based on" a sentencing range subsequently lowered

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[1] The policy statement also provides that a comparable variance "generally" may not be appropriate if the original sentence was "a non-guideline sentence determined pursuant to" Section 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005). The policy statement does not provide further guidance on how the district court should determine whether that general rule applies or whether the circumstances of the individual case counsel a different result. In short, this is a matter left to the district court's discretion.

by the Sentencing Commission, and a sentence in a Rule 11(c)(1)(C) case is based not on a sentencing range but on the plea agreement itself. (App., *infra*, 3a.) The Eighth Circuit concluded that once a district court accepts a Rule 11(c)(1)(C) plea agreement, it is forever barred from reducing the sentence, even if the Commission retroactively amends the Guidelines. *Id.* at 6a-7a.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve the question whether a district court is barred from exercising its statutory power to reduce a sentence under § 3582(c)(2) solely because the court accepted a Rule 11(c)(1)(C) plea agreement. As shown below, the courts of appeals have split three ways on this question. The approach followed by the Eighth Circuit — that a district court *never* has the power to reduce the sentence — is incorrect, and conflicts with this Court's precedent and the plain text and purpose of § 3582(c)(2).

In the wake of the amendments to the crack-cocaine Guidelines, district courts are facing the exact question presented in this case with great frequency. The current state of affairs in the circuit courts — where a defendant's ability to seek a sentence reduction depends on what part of the country he was sentenced in — is intolerable.

It bears noting that the fact that an individual is eligible for a sentence reduction does not mean that he will get one. District courts always retain the discretion to grant or deny reductions based on the merits of each particular case. *See* § 3582(c)(2) ("the court *may* reduce the term of imprisonment" (emphasis added)); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. background (2008) ("The au-

thorization of such a discretionary reduction . . . does not entitle a defendant to a reduced term of imprisonment as a matter of right."). In short, the question presented here is whether, and under what circumstances, a district court *may consider* a sentence reduction under § 3582(c)(2) following a Rule 11(c)(1)(C) agreement. Whether a particular defendant actually qualifies for a reduction is a discretionary judgment that turns on the facts and circumstances of the particular case.

I. THE CIRCUITS HAVE SPLIT THREE WAYS OVER WHETHER A DISTRICT COURT HAS THE POWER TO REDUCE A SENTENCE UNDER 18 U.S.C. § 3582(C)(2).

The circuits take three different approaches to the question whether 18 U.S.C. § 3582(c)(2) permits a district court to reduce a sentence resulting from a Rule 11(c)(1)(C) plea agreement. Under the first approach, district courts can *never* do so. Another approach holds that district courts *may* do so if the court considers or applies the Guidelines when it imposes the sentence. A third approach says that district courts may reduce a sentence if the parties' agreement anticipated the possibility of a retroactive amendment and authorized the reduction prospectively.

1. The Eighth Circuit has adopted the *per se* approach. It holds that a district court can never reduce a sentence resulting from a Rule 11(c)(1)(C) agreement. Under the Eighth Circuit's analysis, a sentence in a case where the parties reached a Rule 11(c)(1)(C) agreement is not "based on" the Guidelines, but rather is based on the agreement itself. According to the court of appeals, "[u]nder Rule 11(c)(1)(C), the [district court] was bound to sentence Scurlark pursuant to the terms of the parties'

agreement, and § 3582(c)(2) became inapplicable because Scurlark's sentence was based on the agreement and not 'a sentencing range that ha[d] subsequently been lowered by the Sentencing Commission.'" (App., *infra*, 5a.) In short, "courts may not act pursuant to subsequent Guidelines amendments to reduce sentences under § 3582(c)(2) for defendants who were sentenced pursuant to binding Rule 11(c)(1)(C) — formerly Rule 11(e)(1)(C) — plea agreements." *Id.* at 3a-4a n.2.

Four other circuits have adopted, in unpublished opinions, the *per se* approach followed by the Eighth Circuit, holding that district courts can never reduce a sentence resulting from a Rule 11(c)(1)(C) plea agreement. *See United States v. Graham*, 304 F. App'x 686, 687-88 (10th Cir. 2008); *United States v. Brown*, 71 F. App'x 383, 384 (5th Cir. 2003); *United States v. McKenna*, No. 97-30173, 1998 WL 30793, at *1 (9th Cir. Jan. 16, 1998) (unpublished table decision); *United States v. Hemminger*, No. 96-2081, 1997 WL 235838, at *1 (7th Cir. May 2, 1997) (unpublished table decision).

The Third Circuit takes a different approach. In *United States v. Sanchez*, 562 F.3d 275, 282 (3d Cir. 2009), the court declined to adopt a *per se* rule, and instead held that a district court's power to reduce a sentence under § 3582(c)(2) in a case involving a Rule 11(c)(1)(C) agreement depends on "what happen[ed] in court" and "what the District Court considered in sentencing the defendant." 562 F.3d at 282. This is a case-by-case approach that focuses on what the district judge said in open court and on the specifics of the plea agreement. Under the Third Circuit's analysis, if the district court considered the Guidelines in accepting the plea, then it has the power to modify the sentence; if it did not consider the Guidelines, it does not. As the court explained:

> The question is what the sentence is based on, and the answer depends on what happened in court. Because district courts, not parties, impose terms of imprisonment, § 3582(c)'s language directs our attention to what the District Court considered in sentencing the defendant.

Id. In short, a defendant's sentence "is 'based on' whatever the District Court considered in imposing it," *id.* at 282 n.8, and if the court expressly considered the Guidelines the sentence may be reduced.[2]

Under the Third Circuit's approach, if the district court expressly states that it is considering the Guidelines in accepting the plea — or if the plea agreement itself requires the district court to consider or apply the Guidelines — then the resulting sentence is "based on" the Guidelines, and the court has the power to reduce it pursuant to § 3582(c)(2). *Accord United States v. Keith*, No. 08-3439, 2009 WL 1783764, at *2 (3d Cir. June 24, 2009) (unpublished) (following *Sanchez*); *see also United States v. Pichon*,

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[2] Judge Roth dissented, reasoning that even if the record did not reflect that the district court considered the Guidelines, all "defendants sentenced under binding plea agreements should be permitted to move for resentencing based on a change in the Guidelines that would affect the basic elements that led up to the final plea agreed upon." 562 F.3d at 283. Judge Roth agreed with the Fourth Circuit's reasoning in *United States v. Dews*, 551 F.3d 204 (4th Cir. 2008), which broadly held that defendants sentenced under a Rule 11(c)(1)(C) agreement were *per se* eligible for sentence reductions under § 3582(c)(2) in cases where the relevant Guidelines changed. The Fourth Circuit subsequently granted en banc rehearing in *Dews*, thus vacating the panel opinion, but the case was dismissed on mootness grounds before it could be decided because Dews (and the defendant in a companion case) had already been released after their sentence reductions.

No. 06-009, 2009 WL 1076709, at *1 (E.D. La. Apr. 16, 2009) (invoking § 3582(c)(2) to reduce sentence imposed pursuant to Rule 11(c)(1)(C) plea agreement); *United States v. Santos*, No. 03-CR-30036, 2009 WL 1766773, at *1 (D. Mass. June 22, 2009) (noting that "[s]ome cases may well arise where the Sentencing Guidelines played such a prominent role in the court's analysis of the appropriateness of the 11(c)(1)(C) sentence that an amendment of the Guidelines would justify a reduction of the sentence"); *United States v. Coleman*, 594 F. Supp. 2d 164, 168 (D. Mass. 2009) (permitting defendant to seek sentence reduction under § 3582(c)(2) based on language in Rule 11(c)(1)(C) plea agreement).

The Sixth Circuit takes an approach that conflicts with both the Eighth Circuit approach and Third Circuit approach. In the Sixth Circuit, the parties may contract around what would otherwise be a prohibition on sentence reductions. In *United States v. Peveler*, the court held that "absent an agreement of the parties, the plain language of . . . Rule 11(c)(1)(C) generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582(c)." 359 F.3d 369, 378 (6th Cir. 2004). Thus, if the parties expressly provide in the agreement that the district court may later modify a sentence, the court has the power to do so, regardless whether the court actually considers the Guidelines in imposing the sentence.

2. This confused state of affairs is intolerable. A defendant's ability to obtain relief when the Sentencing Guidelines are amended should not depend on the circuit in which he was sentenced. This Court has emphasized the importance of "secur[ing] nationwide consistency" in sentencing, *Gall v. United States*, 128 S. Ct. 586, 596 (2007), and the rampant inconsistency that currently exists among the circuits warrants this Court's review.

Mr. Scurlark's case exemplifies the problem, as he would very likely have been eligible for a sentence reduction had he been sentenced in a different circuit. If Mr. Scurlark had been sentenced in the Third Circuit, for example, he could have pointed to ample evidence in the record demonstrating that the district court considered the Guidelines when sentencing him. Among other things, the district court expressly stated to Mr. Scurlark on the record: "you understand that you're going to be sentenced under the Sentencing Guidelines we have . . . *they are guidelines that the Court is going to follow when it sentences you*." (App., *infra*, 33a) (emphasis added). Moreover, the plea agreement explicitly calculated the Guidelines range under the applicable Guidelines and provided for a 40 percent downward variance from the sentencing range. *Id.* at 12a-13a. Mr. Scurlark plainly would have been able to satisfy the Third Circuit's standard by demonstrating that the court considered the Guidelines, and thus he would have been eligible for a sentence reduction.

II. THE EIGHTH CIRCUIT'S APPROACH CONFLICTS WITH *GALL V. UNITED STATES* AND IS CONTRARY TO THE TEXT AND PURPOSE OF THE STATUTE.

1. The Eighth Circuit's holding — that a sentence imposed under a Rule 11(c)(1)(C) plea agreement can never be "based on" the Guidelines — conflicts with *Gall*, 128 S. Ct. at 586.

In *Gall*, this Court emphasized that the starting point for *any* sentencing proceeding must be the calculation of the applicable Guidelines range: "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 128 S. Ct. at 596. To be sure, the Guidelines "are not the only consideration" in sentencing; the district judge must

also "consider all of the § 3553(a) factors to determine whether they support the sentence requested by the party." *Id.* "In so doing, he may not presume that the Guidelines range is reasonable" and "must make an individualized assessment based on the facts presented." *Id.* at 596–97.

The procedure is the same regardless whether the parties have entered into a Rule 11(c)(1)(C) agreement. In the event of such an agreement, the court must begin by considering the Guidelines and then must decide whether to accept the plea agreement. As the Guidelines explain, a district court may accept a Rule 11(c)(1)(C) plea agreement only after comparing the proposed sentence to the applicable guideline range. *See* U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(c) (2005). In short, a court *must* consider the applicable Guidelines range, even if the agreed-to sentence ultimately deviates from that range.

The Eighth Circuit's approach is mistaken. Under *Gall*, *all* sentences must be "based on" the Guidelines, because the Guidelines are the mandatory "starting point" and "initial benchmark." 128 S. Ct. at 596. The Eighth Circuit reasoned that the only type of sentence that is "based on" the Guidelines is one that is imposed "strictly in accordance with the Guidelines." (App., *infra*, 7a.). But this is incorrect. As *Gall* makes clear, in an advisory Guidelines regime, where the Guidelines are merely one factor among several that a court must consider, there will *never* be a case where a sentence is imposed "strictly in accordance with the Guidelines." The Eighth Circuit's interpretation would render § 3582(c)(2) a nullity.[3]

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[3] The notion that a sentence under a Rule 11(c)(1)(C) plea agreement is not "based on" the Guidelines is also inconsistent

2. The fact that Rule 11(c)(1)(C) plea agreements are binding on the court after the court accepts them does not change this analysis. Under that Rule, a plea agreement may state that the government will "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply," and "such a recommendation or request binds the court once the court accepts the plea agreement."

The Eighth Circuit reasoned that in accepting a Rule 11(c)(1)(C) plea agreement, the district court could not have considered anything outside the terms of the agreement and thus was "bound" by those terms once it chose to accept them. But this ignores the fact that the district court could not have accepted those terms until after it had determined whether the proposed sentence comported with the applicable Guidelines. This same process plays out under any plea agreement, whether reached under Rule 11(c)(1)(C) or not. And it is plain from the record that the district court did not make the unconditional decision to sentence under the agreed-upon terms until after it had considered the Guidelines and the other statutory sentencing factors. (App., *infra*, 51a-52a.) Thus, the sentence in this case was

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with the appeal provisions of 18 U.S.C. § 3742. Under that statute, a defendant may appeal a sentence imposed under a Rule 11(c)(1)(C) agreement when the sentence "was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(a)(2). If a Rule 11(c)(1)(C) sentence is never "based on" the Guidelines (whether calculated correctly or incorrectly), it would be nonsensical for Congress to spell out a process by which such a defendant may appeal a sentence that was based on "an incorrect application of the sentencing guidelines."

based on *both* the terms of the agreement *and* the Guidelines.

It is no answer to say that the parenthetical phrase in Rule 11(c)(1)(C) — that a sentencing "recommendation or requests binds the court once the court accepts the plea agreement" — bars a district court from exercising its statutory authority to reduce a sentence in response to a retroactive change in the Guidelines. The structure of Rule 11(c)(1) demonstrates that this language applies only to imposing the sentence initially, not to post-judgment requests for a sentence reduction. Subsection (B) of Rule 11(c)(1) concludes with a different parenthetical: A plea agreement may provide that the prosecution will "recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court)." FED. R. CRIM. P. 11(c)(1)(B). Thus, subsections (B) and (C) together establish two options for plea agreements: the Government may "recommend" a sentencing outcome that is not binding on the court (subsection (B)), or the Government may agree to a sentencing outcome that the court must consider on a take-it-or-leave-it basis (subsection (C)). The parenthetical in subsection (C) was meant to differentiate (C) from (B) and to address a district court's options at the time of the initial sentencing, not to govern the court's discretion to entertain later motions to modify a sentence.

The Eighth Circuit's reading of subsection (C) creates irrational distinctions between similarly situated defendants. Defendants who enter into plea agreements under subsection (B) are allowed to take advantage of retroactive Guidelines amendments — even if the judge follows the Government's recom-

mendation — but defendants who were afforded the protection of a subsection (C) plea agreement would not. That would be so even though in both cases the judge is bound to consider the Guidelines before accepting the agreement and imposing a sentence.[4]

This discrepancy is especially jarring when considered from a defendant's point of view. The only difference between the two plea agreements is that under Rule 11(c)(1)(C) the defendant has the right to withdraw his guilty plea if the sentencing court does not choose to impose the stipulated sentence, while under Rule 11(c)(1)(B), the defendant may not withdraw his plea, except for good cause shown, if the judge decides not to impose the recommended sentence. In all other respects, the sentencing process under each provision is the same. Indeed, in all cases where the judge decides to impose the sentence to which the parties have agreed, there is no difference at all. Whether or not a defendant has the option of withdrawing his guilty plea under the rules of criminal procedure has nothing to do with the interpretation of the phrase "based on" in an entirely separate federal statute. Yet that is precisely the effect of the Eighth Circuit's opinion. (App., *infra*, 5a.)

3. The Eighth Circuit's interpretation is also inconsistent with Congress's goals in enacting § 3582. Congress adopted that section as part of the sentenc-

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[4] Interpreting the parenthetical in subsection (C) to bind the sentencing judge for all time would mean that defendants who enter into Rule 11(c)(1)(C) agreements would also be barred from invoking the other grounds for post-judgment sentence reductions available under 18 U.S.C. § 3582(c). Given that the § 3582(c)(1) grounds have no relation to the distinction between those who plead guilty and those who do not (or between those who plead guilty under Rule 11(c)(1)(C) and those who plead guilty under Rule 11(c)(1)(B)), it is unduly restrictive to read Rule 11(c)(1)(C) in that way.

ing reform provisions of the Comprehensive Crime Control Act of 1984. Section 3582(c) provided "safety valves" to allow for sentence reductions in deserving cases. The Senate Report explained that "[t]he value of the forms of 'safety valves' contained in [§ 3582(c)] lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations." S. Rep. No. 98-225, at 121 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 3304. In a sentencing reform law focused largely on "eliminat[ing] . . . unwarranted sentencing disparity," S. Rep. No. 98-225, at 52 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 3235, Congress understood that these safety valves were important to ensure appropriate review of sentences.

Congress decided that individuals could be eligible for reduced sentences due to a change in the relevant Guidelines. There is nothing to suggest that Congress intended to deem ineligible for reduced sentences those individuals who accept a particular type of plea agreement. Eliminating this eligibility for a whole class of individuals is contrary to the notion of a "safety valve" that allows for the reduction of sentences when the Commission has decided to make a Guidelines change retroactive. Indeed, the Eighth Circuit's approach can only *increase* sentencing disparities, as courts are arbitrarily rendered incapable, in some cases, of implementing the Commission's considered decision to allow retroactive reductions. Such a result is contrary to the stated goals of the sentencing regime implemented by Congress and the Commission.

III. This Issue Is Recurring And Exceptionally Important.

The Eighth Circuit's interpretation of § 3582(c)(2) severely undercuts the Commission's recent amendment to the Guidelines and will frustrate future efforts to make sentencing more uniform and fair. In the near term, this issue affects the many people who could benefit from the long-awaited amendments to the crack-cocaine Sentencing Guidelines. In the wake of those amendments, the federal courts have received numerous motions seeking reductions in sentences, many of which were entered pursuant to a Rule 11(c)(1)(C) agreement and therefore are affected by the circuit split.[5]

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[5] *See, e.g.*, *United States v. Shelton*, No. 08-2512, 2009 WL 1161303 (8th Cir. May 1, 2009) (unpublished) (affirming the district court's decision that the court lacked jurisdiction under 18 U.S.C. § 3582(c)(2) to modify a sentence imposed under a Rule 11(c)(1)(C) plea agreement); *United States v. Frazier*, No. 08-2187, 2009 WL 777999 (8th Cir. Mar. 26, 2009) (per curiam) (unpublished) (same); *United States v. Gage*, No. 08-7075, 2009 WL 389714 (10th Cir., Feb. 18, 2009) (unpublished) (same); *United States v. Oliver*, 589 F. Supp. 2d 39 (D.D.C. 2008) (holding that the court lacked jurisdiction under 18 U.S.C. § 3582(c)(2) to modify a sentence imposed under a Rule 11(c)(1)(C) plea agreement); *United States v. Madden*, No. CR05-213, 2008 WL 4933982 (W.D. Wash. Nov. 17, 2008) (same); *United States v. Johnson*, No. 05-40107-01, 2008 WL 4758581 (D. Kan. Oct. 27, 2008) (same); *United States v. Samuel*, No. 01-40208, 2008 WL 4681639 (N.D. Cal. Oct. 22, 2008) (same); *United States v. Fonville*, No. CR01-1015, 2008 WL 2953610 (N.D. Iowa July 29, 2008) (same); *United States v. Bride*, No. CR04-5350, 2008 WL 2782688 (W.D. Wash. July 14, 2008) (same); *United States v. Tindall*, No. 04cr00031-2, 2008 WL 2518546 (W.D. Va. June 19, 2008) (same); *United States v. Arroyo*, No. 97 CR 1146, 2008 WL 2497430 (E.D.N.Y. June 18, 2008) (same); *United States v. Grigsby*, 560 F. Supp. 2d 1066 (D. Colo. 2008) (same); *United States v. Hines*, No. 3:02-CR-141,

The Sentencing Commission has determined that the crack-cocaine Guidelines under which Mr. Scurlark was sentenced were more severe than necessary. In promulgating the new Guidelines, the Commission reiterated its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." 72 Fed. Reg. 28,573. These problems were "so urgent and compelling" that the Commission saw the need to make Amendment 706 available to individuals who have been sentenced as well as those who have not yet been sentenced, until a more comprehensive solution could be fashioned. *Id.* The Commission envisioned its change having an immediate impact, predicting it would "result in a reduction in the estimated average sentence of all crack cocaine offenses from 121 months to 106 months." *Id.*

The Eighth Circuit's erroneous interpretation of § 3582(c)(2) strips the Commission's decision of much of its force. Crack-cocaine defendants have historically made up almost one quarter of all federally sentenced drug-trafficking offenders. *See Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Commission). Moreover, fully 96 percent of federal drug defendants plead guilty, U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11 (2008), "and many of these cases involve

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2008 WL 2169516 (E.D. Tenn. May 22, 2008) (same); *United States v. Gordon*, No. 97-24, 2008 WL 901911 (E.D. Okla. Mar. 31, 2008) (same).

some form of plea agreement," U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 1.4(c) (2008). Under the decision below, a large number of criminal defendants and a large proportion of defendants sentenced under the former crack-cocaine Guidelines — Guidelines that the Commission has now determined "undermine[] various congressional objectives" — are barred from relief. That massive effect on numerous individuals throughout the country demonstrates that this issue should be decided by this Court.

Moreover, as this Court recognized in *Kimbrough*, the Guidelines for crack-cocaine offenses that applied to Mr. Scurlark did not "exemplify the Commission's exercise of its characteristic institutional role" because "the Commission . . . did not take account of 'empirical data and national experience,'" as it has done for other offenses. 128 S. Ct. at 575. As a result, the old range "produce[d] disproportionately harsh sanctions," which is why the Commission retroactively amended the range. *Id.* The Eighth Circuit's decision unjustifiably perpetuates the effect of the old range, acknowledged by both the Commission and this Court not to have been based on the sort of data-driven analysis that the Commission ordinarily undertakes in fashioning Guidelines ranges.

Still worse, the Eighth Circuit's decision holds that sentences like Mr. Scurlark's were not "based on" the old discredited Guidelines range, even though prior to *Kimbrough* many sentencing judges had no power to deviate from that range due to a disagreement with a policy judgment that the Commission has since changed. *See id.* ("Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case."). As a result, before *Kimbrough*, defendants in Mr. Scurlark's posi-

tion were unable to obtain a lower sentence based on the crack-powder disparity. That unquestionably resulted in higher sentences that were not justified by either "empirical data or national experience."

The decision to deny this class of individuals the right to have a court even *consider* whether to reduce their sentences creates gross inequities. A defendant who refuses to admit his guilt and goes to trial can take advantage of the Commission's subsequent reassessment of the appropriate penalty, but a significant number of defendants who plead guilty must serve out sentences that may be much longer than what the Commission has now deemed fair — and retroactively applicable.

The importance of this case is not limited to the current revision of the crack-cocaine Guidelines (although the sheer number of potential individuals affected by that revision would alone justify this Court's review). In each instance in which the Commission decides to take the special step of making an amendment retroactive — based on its express and informed determination "that a reduced guideline range is sufficient to achieve the purposes of sentencing," U.S. SENTENCING GUIDELINES § 1B1.10 cmt. background (2008) — the approach taken by the Eighth Circuit bars the Commission from applying its decision to a large number of individuals. The Eighth Circuit's approach would eliminate the Commission's authority *ever* to make retroactive changes applicable to sentences bargained for under Rule 11(c)(1)(C).

What is more, restricting the Commission's authority to make sentence reductions available undermines the Commission's stated objective of ensuring that sentences appropriately fulfill congressional purposes of sentencing. As the Commission has explained, plea-negotiation practices should "promote

the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a)" and "not perpetuate unwarranted sentencing disparities." U.S. SENTENCING GUIDELINES MANUAL ch. 6, pt. B, introductory cmt. (2008). But if the Commission is limited in the extent to which it can retroactively correct "unwarranted sentencing disparity" in the plea-bargain context, these objectives are hampered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 24, 2009

APPENDIX

APPENDIX A

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,

v.

Wilmer Lee SCURLARK, also known as Bonay, Appellant.

No. 08-2404.

Submitted: Feb. 9, 2009.
Filed: March 26, 2009.

Robert J. Shane, Minneapolis, MN, for appellant.

Richard Newberry, AUSA, Minneapolis, MN, for appellee.

Before LOKEN, Chief Judge, MELLOY and BENTON, Circuit Judges.

MELLOY, Circuit Judge.

Wilmer Scurlark appeals the district court's[1] denial of his motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). We affirm.

I.

In 2006, a federal grand jury indicted Scurlark for attempted distribution of crack cocaine, possession with intent to distribute crack cocaine, and failure to appear. Scurlark and the Government entered into a plea agreement whereby Scurlark agreed to plead guilty to possession with intent to distribute

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[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

crack cocaine. In exchange, the Government agreed to dismiss the indictment's remaining counts, forgo seeking sentencing enhancements, and recommend a forty-percent downward variance. Additionally, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties agreed to a binding sentencing range of 151 to 188 months' imprisonment, agreeing that Scurlark's offense level was 33 and that he had a Category II criminal history. The district court accepted Scurlark's guilty plea and the parties' plea agreement. The court then applied the Government's recommended forty-percent downward variance to the parties' agreed upon sentencing range and sentenced Scurlark to 100 months' imprisonment.

In 2008, Scurlark moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). Scurlark argued that the crack cocaine amendments to the U.S. Sentencing Guidelines – which retroactively reduced base-offense-level calculations for crack-cocaine offenses – reduced his base offense level to 31, making his recommended sentencing range only 121 to 151 months. *See United States v. Starks*, 551 F.3d 839, 840 (8th Cir. 2009) (discussing the crack cocaine amendments to the U.S. Sentencing Guidelines). Scurlark asked the district court to apply a forty-percent downward variance to that range and reduce his sentence accordingly.

The district court denied Scurlark's motion. It found as a matter of law that it could not reduce Scurlark's sentence under § 3582(c)(2) because Scurlark had been sentenced pursuant to a binding Rule 11(c)(1)(C) plea agreement. Scurlark filed a timely notice of appeal.

II.

On appeal, Scurlark argues that the district court erred in finding that, under § 3582(c)(2), Rule

11(c)(1)(C) plea agreements prohibit courts from reducing sentences pursuant to subsequent amendments to the U.S. Sentencing Guidelines. We review the court's legal conclusion *de novo*. *See United States v. Spotted Elk*, 548 F.3d 641, 668 (8th Cir. 2008).

The applicable provision of § 3582(c)(2) provides:

> The court may not modify a term of imprisonment once it has been imposed except that . . . (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). "The policy statement applicable to sentence reductions based on retroactive amendments by the Sentencing Commission is USSG § 1B1.10." *Starks*, 551 F.3d at 841. Section 1B1.10 authorizes sentence reductions pursuant to the crack-cocaine amendments. *Id.*

Despite § 3582(c)(2)'s authorization for district courts to reduce sentences pursuant to the crack cocaine amendments, the Government nevertheless argues that § 3582(c)(2) is inapplicable here because Scurlark's sentence was based on a binding Rule 11(c)(1)(C) plea agreement, not the subsequently amended Guidelines.[2] We agree.

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[2] The majority of courts that have examined this issue have adopted the Government's position that courts may not act pur-

Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure[3] provides that a "plea agreement may specify that an attorney for the government will . . . (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case." Fed. R. Crim. P. 11(c)(1)(C). It further declares that "such a recommendation or request binds the court once the court accepts the plea agreement." *Id.* Accordingly, "[a] plea agreement under Rule 11(c)(1)(C), like all plea agreements, is binding on both the government and the defendant, but Rule 11(c)(1)(C) plea agree-

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suant to subsequent Guidelines amendments to reduce sentences under § 3582(c)(2) for defendants who were sentenced pursuant to binding Rule 11(c)(1)(C) – formerly Rule 11(e)(1)(C) – plea agreements. *See, e.g.*, *United States v. Graham*, 304 F. App'x 686, (10th Cir. 2008) (unpublished); *United States v. Peveler*, 359 F.3d 369, 378-79 (6th Cir. 2004); *United States v. Brown*, 71 F. App'x 383, 384 (5th Cir. 2003) (unpublished); *United States v. McKenna*, 134 F.3d 380, 1998 WL 30793, at *1 (9th Cir. 1998) (unpublished table decision); *United States v. Hemminger*, 114 F.3d 1192, 1997 WL 235838, at *1 (7th Cir. 1997) (unpublished table decision); *United States v. Oliver*, 589 F. Supp. 2d 39, 40-41 (D.D.C. 2008); *United States v. Madden*, No. CR05-213RSL, 2008 WL 4933982, at *1 (W.D. Wash. Nov. 17, 2008); *United States v. Arroyo*, No. 97 CR 1146(ILG), 2008 WL 2497430, at *1 (E.D.N.Y. June 18, 2008); *United States v. Clayborn*, No. 1:CR-05-51-01, 2008 WL 2229531, at *1 (M.D. Pa. May 28, 2008); *United States v. Hines*, No. 3:02-CR-141, 2008 WL 2169516, at *2 (E.D. Tenn. May 22, 2008). *But see United States v. Dews*, 551 F.3d 204, 207-12 (4th Cir. 2008); *United States v. Coleman*, 594 F. Supp. 2d 164, 165-67 (D. Mass. 2009).

3 "The Federal Rules of Criminal Procedure were amended in 2002, and language similar to that contained in the 1999 version of Rule 11(e)(1)(C) is now found in Fed. R. Crim. P. 11(c)(1)(C) (2007)." *United States v. E.V.*, 500 F.3d 747, 753 n. 9 (8th Cir. 2007). The 2002 amendment to the provision made only "stylistic" changes. Fed. R. Crim. P. 11 advisory committee's note.

ments are unique in that they are also binding on the court *after* the court accepts the agreement." *United States v. Kling*, 516 F.3d 702, 704 (8th Cir. 2008); *see also United States v. Pacheco-Navarette*, 432 F.3d 967, 972 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from . . . sentences stipulated in [Rule 11(c)(1)(C)] agreements."); *United States v. Williams*, 260 F.3d 160, 165 (2d Cir. 2001) ("[A] district court may accept or reject a Rule 11(e)(1)(C) sentence bargain, but may in no event modify it.").

Here, the parties stipulated to a sentencing range in their plea agreement and agreed to be bound by the terms of Rule 11(c)(1)(C). Each party offered concessions to reach the agreement, and the district court could have accepted or rejected the agreement based upon its determination that the agreement was not "involuntary or unfair." *Kling*, 516 F.3d at 704. The district court undisputedly accepted the agreement. Under Rule 11(c)(1)(C), the court therefore was bound to sentence Scurlark pursuant to the terms of the parties' agreement, and § 3582(c)(2) became inapplicable because Scurlark's sentence was based on the agreement and not "a sentencing range that ha[d] subsequently been lowered by the Sentencing Commission." § 3582(c)(2); *see also United States v. Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."); *United States v. Trujeque*, 100 F.3d 869, 871 (10th Cir. 1996) ("Mr. Trujeque's sentence was not 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission.' Instead, his sentence was based on a valid Rule 11(e)(1)(C) plea agreement." (quoting 18 U.S.C. § 3582(c)(2))).

The circumstances surrounding this Rule 11(c)(1)(C) plea agreement demonstrate the contractual nature of the agreement and the fact that the sentence was not based on a sentencing range that was subsequently lowered. Scurlark was originally arrested and charged in 1994 with possession with intent to distribute 218 grams of crack cocaine. He absconded and was a fugitive until 2006. During the time he was a fugitive, Scurlark appeared to lead a law-abiding and productive life. The 2006 plea agreement was apparently struck to address the fact that Scurlark had led a law-abiding life for twelve years and to relieve the government of the burden of having to prove a case in which evidence had been destroyed and memories had faded. Among the benefits Scurlark received in the plea agreement by being sentenced outside of the Guidelines were the dismissal of the count that carried a mandatory ten-year minimum sentence, a Government agreement to recommend a forty-percent downward variance, a Government agreement not to contest acceptance of responsibility credit in spite of an obstruction of justice enhancement, and an agreement to other favorable Guideline computations.

Scurlark argues, however, that his sentence was, in fact, based on the Sentencing Guidelines because the plea agreement stipulated to a sentencing range, not a particular sentence. This distinction does not distinguish Scurlark's case under Rule 11(c)(1)(C). Rule 11(c)(1)(C) itself provides that parties may agree to "a specific sentence *or* sentencing range" and states that courts are bound by those agreements regardless. Fed. R. Crim. P. 11(c)(1)(C) (emphasis added); *see also Peveler*, 359 F.3d at 378 ("The fact that the parties in this case specified an offense level under the sentencing guidelines rather than a fixed period of imprisonment . . . is a distinction without a difference in terms of the court lacking the power to

amend the plea agreement."). Had Scurlark been sentenced strictly in accordance with the Guidelines, it is likely his Guideline sentence would have been at or near the twenty-year mandatory maximum. For these reasons, we agree with the district court that it had no authority to reduce Scurlark's sentence under § 3582(c)(2).

III.

We affirm the district court's judgment denying Scurlark's motion for a sentence reduction.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4:94-103 (DSD)

United States of America,

Plaintiff,

v. **ORDER**

Wilmer Lee Scurlark,

Defendant.

This matter is before the court on defendant Wilmer Lee Scurlark's motion for a reduction of sentence pursuant to 18 U.S. C. § 3582(c)(2).[1] Based upon a review of the file, record and proceedings herein, defendant's motion is denied.

On May 2, 2006, defendant was charged in a three-count superseding indictment with attempted distribution of crack cocaine, possession with intent to distribute crack cocaine and failure to appear. Defendant pleaded guilty to count two on May 22, 2006, pursuant to a Federal Rule of Criminal Procedure

[1] Defendant filed a pro se motion on October 29, 2007. After the government opposed defendant's motion, the court ordered appointment of counsel on February 4, 2008. Defendant's counsel has since filed a memorandum in support of the motion.

11(c)(1)(C) plea agreement. In the plea agreement, the parties agreed that with an adjusted offense level of thirty-three and a category II criminal history, defendant's advisory range under the United States Sentencing Guidelines ("Guidelines") was 151 to 188 months. The government also agreed to recommend a forty-percent departure – approximately sixty-eight months – from that range. The court accepted the plea agreement and on September 19, 2006, sentenced defendant to a 100-month term of imprisonment. Defendant now moves pursuant to § 3582(c) for a reduction of that sentence in light of Amendment 706 to the Guidelines.

Amendment 706 retroactively "reduce[s] the base offense levels in [Guidelines] § 2D1.1(c) based on the quantity of cocaine base (crack)." *United States v. McFadden*, 523 F.3d 839, 840 (8th Cir. 2008). Section 3582(c)(2) provides for modification of a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

In this case, however, the court sentenced defendant pursuant to a Rule 11(c)(1)(C) plea agreement. Rule 11(c)(1)(C) permits the government and a defendant to "agree that a specific sentence or sentencing range is the appropriate disposition of the case." In accepting the plea agreement, a court is bound by its terms. *Id.* Thus, a sentence imposed in accordance with a Rule 11(c)(1)(C) plea agreement is based on the agreement, not a subsequently lowered sentencing range as required by § 3582(c). *See United States v. Trujeque*, 100 F.3d 869, 871 (9th Cir. 1996). This holds true even where "the parties specified an offense level under the sentencing guidelines rather than a fixed period of imprisonment," *United*

States v. Peveler, 359 F.3d 369, 378 (6th Cir. 2004), or where a defendant relied on the applicable Guidelines range in deciding to enter into the plea agreement, *United States v. Clayborn*, Crim. No. 1:05-51-01, 2008 U.S. Dist. LEXIS 41772, at *3-7 (M.D. Pa. May 28, 2008). Therefore, Amendment 706 does not provide for a reduced sentence where, as here, a defendant is sentenced pursuant to a Rule 11(c)(1)(C) plea agreement. *Accord United States v. Frazier*, No. 02-56, 2008 U.S. Dist LEXIS 38180, at *3-4 (N.D. Iowa May 8, 2008); *United States v. Gordon*, No. 97-24, 2008 U.S. Dist. LEXIS 25898, at *3 (E.D. Okla. March 31, 2008). Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to modify his sentence [Doc. No. 34] is denied.

Dated: June 13, 2008

s/David S. Doty
David S. Doty, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	
Plaintiff,	)	
	)	**PLEA AGREEMENT**
vs.	)	**AND SENTENCING STIPULATIONS**
Wilmer Lee Scurlark,	)	
Defendant.	)	

The United States by its attorneys Rachel K. Paulose, United States Attorney for the District of Minnesota, and Richard Newberry, Assistant United States Attorney, and the defendant, Wilmer L. Scurlark, by himself, and with his attorney, Robert J. Shane, Esq., hereby agree to dispose of this case on the following terms and conditions.

FACTUAL BASIS

1. The government and the defendant agree that on or about July 29, 1994 in the State and District of Minnesota, the defendant, did knowingly and intentionally possess with the intent to distribute 216 grams of a mixture or substance containing a detect-

able amount of cocaine base ("crack"), a controlled substance.

AGREEMENT AND STIPULATIONS

2. The defendant will plead guilty to Count 2 of the Superseding Indictment charging the defendant with possession with intent to distribute a mixture of substance containing a detectable amount of cocaine base ("crack cocaine") in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C). At the time of sentencing, if the court accepts the defendant's guilty plea, the government agrees to dismiss the remaining counts against the defendant.

3. The defendant understands that the maximum punishment for this offense IS as follows:

A. 20 years of imprisonment;

B. the 10 year mandatory minimum sentences under 21 U.S.C. 841(a)(l) does not apply;

C. a fine of up to $1,000,000.00;

D. a supervised release term of at least 3 years;

E. a mandatory special assessment of $100.00;

F. the assessment of the defendant of the costs of prosecution, imprisonment, and supervision, and

G. the possible loss of eligibility for federal benefits.

4. The government agrees not to file a notice pursuant to 21 U.S.C. Section 851 of its intent to seek an enhanced sentenced.

5. The United States agrees to recommend at the time of sentencing a downward variance of 40% or approximately 68 months imprisonment from the advisory Sentencing Guideline range based on the totality of the circumstance, including, the defendant's post offense rehabilitation pursuant to the factors specified in Title 18, United States Code, Section 3553(a).

6. The defendant understands that he will be sentenced in accordance with the applicable Sentencing Guidelines under the Sentencing Reform Act of 1984. The parties have agreed upon the following position of the parties with respect to sentencing factors and the position is binding on them and the court under Federal Rule of Criminal Procedure 11(c)(l)(C).

7. Base Offense Level. The parties agree that the appropriate Guidelines Section for Count II of the Superseding Indictment is Section 2D1.1. The parties agree that the base offense level is 34.

8. Specific Offense Characteristics. The parties agree that none of the specific offense characteristics listed in Section 2D1.1(b)(1) – (5) will apply in this case.

9. Adjustments. The parties agree that pursuant to Section 3C1.1, Obstructing or Impeding the Administration of Justice, the defendant should receive an increase in the offense level by 2 levels.

10. Acceptance of Responsibility. The government will recommend that the defendant receive a three level credit for acceptance of responsibility provided that: (1) he testifies truthfully during the change of plea hearing, (2) he cooperates with the Probation Office in the pre-sentence investigation; and (3) he commits no further acts inconsistent with acceptance of responsibility.

11. Criminal History Category. The parties agree that the defendant's criminal history category is at Level II.

12. Advisory Guideline Range. Depending on the Court's determination of guideline factors, the parties believe that the following advisory guideline range is possible: Level 33 (34-3+2=33) Category II - 151-188 months imprisonment.

13. Fine Range. Assuming an offense level 33, the fine range is $17,500 to $175,000.

14. Special Assessment. The guidelines require payment of a special assessment in the amount of $100.00. Section 5E.3.

15. Supervised Release. The applicable guideline range for supervised release is a minimum of 3 years. The defendant understands that, if he were to violate any condition of supervised release, he could be sentenced to an additional term of imprisonment.

The foregoing accurately sets forth the full extent of the Plea Agreement and the Sentencing Stipulations in the above-captioned matter.

Dated:_____ RACHEL K. PAULOSE
United States Attorney

_____
BY: RICHARD NEWBERRY
Assistant U.S. Attorney

Dated:_____ _____
WILMER L. SCURLARK
Defendant

Dated:_____ _____
ROBERT J. SHANE, ESQ.
Attorney for Defendant

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	File No. 4:94-103
	)	(DSD/JSM)
Plaintiff,	)	
	)	
vs.	)	
	)	
Wilmer Lee Scurlark,	)	Minneapolis, MN
	)	May 22, 2006
Defendant.	)	10:00 a.m.
	)	

BEFORE THE HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT JUDGE
(ARRAIGNMENT AND PLEA)

APPEARANCES

For the Plaintiff: U.S. Attorney's Office
RICHARD NEWBERRY, AUSA
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

For the Defendant: Shane Law Office
ROBERT J. SHANE, ESQ.
Suite 700
10 South Fifth Street Minneapolis, MN 55402

Court Reporter: Lorilee K. Fink, RPR CRR
1005 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

(May 22, 2006, 10:00 a.m.)

THE CLERK: This is the matter of the United States versus Wilmer Lee Scurlark. May I have appearances, please.

MR. NEWBERRY: Good morning, Your Honor, Richard Newberry appearing on behalf of the Government.

THE COURT: Good morning.

MR. SHANE: Good morning, Your Honor, Robert Shane appearing as defense counsel along with Mr. Scurlark who is present before the Court.

THE COURT: And the Court notes Mr. Scurlark's presence. Mr. Scurlark, do you want to raise your right hand, please.

WILMER LEE SCURLARK SWORN

THE COURT: Put your hand down. The reason I just swore you in is you are going to be asked a number of questions now by the prosecutor, possibly by your own counsel, certainly by the Judge. I want to make sure you give truthful and honest answers to those questions. If you do not, now that you've been sworn, it would be another offense called perjury. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. Go ahead.

MR. NEWBERRY: Thank you, Your Honor. Would you like me to start with a summary of the plea agreement, Your Honor?

THE COURT: If you would, the plea agreement and then go into the rights and so forth. Apparently in this case my clerk was just noticing that this young man hasn't been arraigned yet also. Do you want to go through the procedural requirements of an arraignment first, maybe that would be helpful.

MR. NEWBERRY: Certainly, Your Honor.

THE COURT: Thank you.

MR. NEWBERRY: I don't actually have the date of the superseding indictment, Your Honor, although I've been provided now a copy of the superseding indictment.

BY MR. NEWBERRY:

Q Mr. Scurlark, a superseding indictment has been filed in the case against you in the United States of America versus Wilmer Lee Scurlark, also known as Bonay on May 2, 2006, alleging in Count 1, attempted distribution of crack cocaine; Count 2, possession with intent to distribute crack cocaine; and Count 3, failure to appear.

Have you had an opportunity to review this superseding indictment with Mr. Shane?

A Yes.

Q As to the charges in Count 1 and 3 of the superseding indictment, how do you plead, guilty or not guilty?

A Guilty.

Q Excuse me, with regard to Count 2 of the superseding indictment, how do you plead, guilty or not guilty?

A Guilty.

MR. NEWBERRY: Your Honor, with regard to the plea agreement, I should note for the record that Mr. Shane drafted the plea agreement and I will summarize it as follows: In fact – excuse me – paragraph 1 provides a factual basis upon which the Court can accept a plea of guilty to Count 2 of the superseding indictment.

Paragraph 2 acknowledges that in the superseding indictment, the defendant will plead guilty to Count 2, charging possession with intent to distribute a mixture containing a detectible amount of crack cocaine under Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

At the time of sentencing, if the Court accepts the defendant's plea of guilty, the Government agrees to dismiss the remaining counts in the indictment.

Count 2 provides for the maximum potential penalty for the offense alleged in Count 2. That includes the maximum term of imprisonment of 20 years; that the ten-year mandatory minimum sentence in 21, United States Code, Section 841(b)(1)(A) does not apply. A fine of up to $1 million, a supervised release term of at least three years, a mandatory special assessment of $100, the assessment to the defendant for the costs of prosecution, imprisonment, supervision, and that the defendant, it's possible, could lose the eligibility for any federal benefits of which we are not aware of any.

Paragraph 4, the Government agrees not to file a notice under Title 21, United States Code, Section 851.

Paragraph 5 acknowledges that the Government agrees to recommend a downward variance of 40 percent or approximately 68 months from the advisory sentencing guideline range based on the totality of

the circumstances in this case, which also includes the defendant's post-offense rehabilitation.

Paragraph 6 is an acknowledgement that the defendant understands he'll be sentenced in accordance with the applicable Sentencing Guidelines under the Sentencing Reform Act of 1984.

The parties have agreed upon the following position: With respect to the sentencing factors and if adopted, the position – this position is also binding upon the Court under Federal Rule of Criminal Procedure 11(c)(1)(C).

The parties believe that the appropriate guideline section for Count 2 of the superseding indictment is Section 2D1.1. We believe that the base offense level is 34 based on the amount of crack cocaine.

The parties believe that none of the specific offense characteristics listed in 2D1.1(b), 1 through 5 will apply in this case.

The parties agree that a two-level increase is applicable under Section 3C1.1, obstruction or impeding the administration of justice; that's inasmuch as the defendant fled and was a fugitive for many years. The Government, under the circumstances of this case, recognizing that it is unusual – an unusual occurrence, the Government will recommend a three-level reduction for acceptance of responsibility, provided that the defendant testify as truthfully here today during the change of plea hearing, cooperates with the probation office in the presentence report investigation, and commits no other acts inconsistent with the acceptance of responsibility.

The parties agree that defendant's Criminal History is Category II.

Based on those calculations and depending on the Court's determination of the guideline factors,

the parties believe that the following advisory guideline range is possible: Based on offense level of 32, minus three levels for acceptance of responsibility, adding two levels for the obstruction or impeding the administration of justice, the total offense level would be 33. Criminal History Category II would result in a term of imprisonment of 151 to 188 months from which we would recommend a reduction – a variance as earlier discussed.

The fine range, assuming an offense level of 33, is 17,500 to $175,000.

The guidelines include a payment of special assessment in the amount of $100. Applicable guideline range for supervised release is three to five years. And the defendant understands if he were to violate any condition of supervised release, he could be sentenced to an additional term of imprisonment.

That is the essence of the plea agreement, Your Honor.

BY MR. NEWBERRY:

Q Mr. Scurlark, I'm holding the original of the plea agreement and sentencing stipulation in this case, have you seen this document before?

A Yes.

Q Have you gone over this document entirely with your attorney, Mr. Shane?

A Yes.

Q Have you been able to ask him any questions that you have about the document?

A Yes.

Q Has he been able to answer those questions to your satisfaction?

A Yes.

Q Have you actually read this line by line?

A Yes.

Q On page 4 there is – over the name, Wilmer L. Scurlark, there's a signature there, do you see that?

A Yes.

Q Did you sign this document freely and voluntarily?

A Yes.

Q And was that in an effort to ask the Judge to accept your plea of guilty here this morning?

A Yes.

MR. NEWBERRY: Your Honor, we will tender to the Court the original of the plea agreement and sentencing stipulation at this time.

THE COURT: And it will be lodged with the Court.

MR. SHANE: Your Honor, I wanted to point out a typographical error in paragraph 3(b) of the plea agreement. The citation is incorrect and Mr. Newberry was sharp enough to catch that. It should be that the mandatory minimum sentence does not apply under 21 U.S.C. 841(b)(1)(A) versus (a)(1).

THE COURT: Has that been changed on the agreement itself?

MR. NEWBERRY: It has not, Your Honor.

MR. SHANE: It has not.

THE COURT: Why don't you just change it. You can do it by pen and then have everyone initial it. We'll file it.

While we're doing that, I just want to make sure that when we were going through the arraignment portion this morning, Mr. Scurlark, I think probably misunderstood or maybe Mr. Newberry misunderstood and had Mr. Scurlark plead guilty to counts

other than Count 2. And if I'm understanding the agreement, that maybe should be corrected also.

MR. NEWBERRY: You're absolutely right, Your Honor, and that was my mistake. I did try to correct that, and I'll do that at this time. I'll, again, tender the plea agreement to the Court, Your Honor.

BY MR. NEWBERRY:

Q Mr. Scurlark, I offered up what – in somewhat confusing sequence when we talked earlier about the superseding indictment. I'm going to try to clear that up now.

On May 2, 2006 a superseding indictment was filed in the case against you. Do you understand that?

A Yes.

Q There are three counts of this superseding indictment. Have you gone over those with your attorney?

A Yes.

Q Do you waive a reading of the charges in the superseding indictment?

A Yes.

Q I'm not asking you now with regards to Count 1 and 3, but more specifically with regard to Count 2, which is contemplated in the plea agreement that we've just gone over. With regard to Count 2 of the superseding indictment, how do you plead guilty or not guilty?

A Guilty.

MR. NEWBERRY: Is that sufficient, Your Honor?

THE COURT: I think so. Why don't you go ahead then and go over the constitutional rights and

other rights that Mr. Scurlark will be giving up if he does plead guilty.

MR. NEWBERRY: Certainly, Your Honor.

THE COURT: I'm not going to accept your plea of guilty until we've gone over some other things, Mr. Scurlark, so it's going to take a little bit longer.

BY MR. NEWBERRY:

Q Mr. Scurlark, I'm going to ask you a number of questions that relate to your constitutional rights and to the facts of this case. Do you understand that?

A Yes.

Q And I'm asking these questions of you so that the Judge can make a determination as to whether or not, number one, you're able to enter a plea of guilty here this morning. Do you understand that?

A Yes.

Q Whether you understand all of your rights and if you wish to give up you those rights in order to plead guilty here this morning. Do you understand that?

A Yes.

Q And finally, whether or not there are sufficient facts which would support a plea of guilty to Count 2 of the superseding indictment. Do you understand that?

A Yes.

Q With regard to the superseding indictment, you understand that you have been charged with attempted distribution of crack cocaine in Count 1; possession with intent to distribute crack cocaine in Count 2. Those are from the same date, July 29, 1994. Do you recall that?

A Yes.

Q And Count 3 charges you with a failure to appear; that is in August of 1994, you failed to appear. That is, you fled the jurisdiction while on pretrial release. Do you understand that?

A Yes.

Q And we have gone over the fact that if you plead guilty to Count 2 of the superseding indictment, the Government will move to dismiss Counts 1 and 3 at the time of the sentencing. Do you understand that?

A Yes.

Q Now, you understand, based on the plea agreement which we went over earlier, that the maximum potential penalty for Count 2 of the superseding indictment includes a term of 20 years imprisonment, a fine of up to $1 million, a supervised release term of at least three years, a special assessment of $100, and it could include the assessment to you for the costs of prosecution, imprisonment and supervision. Do you understand that?

A Yes.

Q You would also – it's also possible that you may lose any eligibility for federal benefits as a result of a conviction for Count 2 of the superseding indictment. Do you understand that?

A Yes.

Q. And do you understand that those maximum penalties could include all of those things? You understand that?

A Yes.

Q. And you understand that the concept of supervised release, which is mentioned there, is a period which occurs after you're released from any term of imprisonment. Do you understand that?

A Yes.

Q It would be – years ago, it would be much like something like parole, where after you're released from any term of imprisonment, you would then be released to the community on some certain conditions, and then if you violated any of those conditions, you could be returned to prison for a period up to the original term of your supervised release. Do you understand that?

A Yes.

Q Other than what is included in the plea agreement, has there been any – has anyone made any promises to you as to what the Judge would do at the time of sentencing?

A No.

Q You understand that the Court need not accept your plea of guilty unless the Court is satisfied that, in fact, you are guilty of this offense and that you fully understand all of your rights. Do you understand that?

A Yes.

Q Now, at some point you entered a – actually, I don't think you were arraigned, so you didn't enter a plea of not guilty. But you understand that you could enter a plea of not guilty here today and you could maintain that plea of guilty and you could have a trial in this case. You understand that?

A Yes.

Q And you understand that you could have – you do have the right to a speedy trial, and that trial would have to occur within 70 days of the time of the indictment, and we could have that trial certainly within the 70 days in which you were indicted. You understand that?

A Yes.

Q You understand that by having a trial, you are going to give up that right to have a speedy trial. Do you understand that?

A Yes.

Q Do you understand that you have the right to have a trial by a jury of 12 persons and before you could be convicted of any offense, all 12 persons on the jury would have to agree unanimously that you're guilty of the offenses. Do you understand that?

A Yes.

Q At any trial, you would have the right to the assistance of counsel and if you could not afford an attorney, an attorney would be appointed to represent you. Do you understand that?

A Yes.

Q At any trial, you would have the right to confront and to cross-examine any witnesses against you; that is, any witness the Government were to call as a witness against you would have to come into open court here, go up on the witness stand, swear to tell the truth, and be subject to the questioning of your attorney, Mr. Shane. Do you understand that?

A Yes.

Q At any trial, you would be presumed innocent of any criminal offense until the charge was be proven by the Government beyond a reasonable doubt. Do you understand that?

A Yes.

Q And, in fact, it's the Government that bears the burden to prove your guilt beyond a reasonable doubt. Do you understand that?

A Yes.

Q At any trial, you would have the absolute right to testify on your own behalf and it would be your

decision alone, in consultation with Mr. Shane, but ultimately it would be your decision. So, for instance, if you decided that at trial you wanted to testify, even if Mr. Shane suggested that you not testify, it would be your choice ultimately as to whether or not you testify or not, no one could prevent you from testifying, you understand that?

A Yes.

Q And the flip side of that coin is that no one could compel you to incriminate yourself. And that is, no one could force you to testify at trial. And if you chose to exercise that right not to testify at trial, the Government, nor the Court would comment to the jury on the fact that you did not testify. Do you understand that?

A Yes.

Q So, for instance, if you chose not to testify at the trial, as the prosecutor, I would not be able to stand before the jury and argue to them, well, Mr. Scurlark must be guilty because he hasn't told you his side of the story. You understand I wouldn't be able to do that and the Judge wouldn't make any comment like that?

A Yes.

Q Now, if you chose to have a trial, you would have the right to compulsory process; to call witnesses on your own behalf. And by that we mean, you could use the subpoena power of the Court to require or to compel witnesses to come in and testify on your behalf if you thought it could help your case. Do you understand that?

A Yes.

Q So, if there was someone out there that you thought had some evidence that would be helpful for you, but they didn't really want to come into court, they just didn't want to be involved, the subpoena

power of the Court could compel them to come to court and if they didn't, then they would be subject to some penalties. Do you understand that?

A Yes.

Q Now, you understand that if the Judge accepts your plea of guilty in this plea agreement, there will be no trial of any kind. Do you understand that?

A Yes.

Q You understand also, that if the Judge accepts your plea of guilty, you will have no right to appeal the fact of your guilt. Do you understand that?

A Yes.

Q Now, I've gone over a number of your constitutional rights, primarily that relate to your right to have a trial in this particular case. Do you understand all of the rights that we have discussed here this morning?

A Yes.

Q And do you voluntarily give up those rights to – in an effort to ask the Judge to accept your plea of guilty here this morning?

A Yes.

Q Have there been any threats or any promises to you to get you to plead guilty here this morning other than the promises that appear in the plea agreement?

A No.

Q Have you had any drugs or alcohol within the last 24 hours?

A No.

Q Are you under the care of a doctor at this time?

A No.

Q Are you taking any prescription medicine?

A No.

Q Have you ever been treated for any mental health issues?

A No.

Q Have you ever been treated for any chemical dependency, alcohol or drug-related issues?

A No.

Q Now, Mr. Shane has represented you in this case since you returned – since you were returned by the Marshal Service to the District of Minnesota, is that correct?

A Yes.

Q And you were – you got back to Minnesota here sometime in March of this year, is that correct?

A Yes.

Q Have you had sufficient amount of time to confer with your attorney Rob Shane in this case?

A Yes.

Q And are you satisfied with the representation that he's provided for you in this case?

A Yes.

Q Now, with regard to Count 2 of the superseding indictment, do you recall back on July 29, 1994, a date in which out in South Minneapolis just near Franklin and 11th Avenues in South Minneapolis, you went there with a quantity of crack cocaine, approximately 216 grams or somewhere around – approximately eight ounces of crack cocaine. And you were there with the intent to distribute or to sell that crack cocaine. Do you recall that?

A Yes.

Q And that was, as I indicated, in South Minneapolis here in Minnesota, is that correct?

A Yes.

Q Did you know that that substance was crack cocaine?

A Yes.

Q And was it your intent to sell it to an individual who was working with the police at that time?

A Yes.

Q You didn't know the person was working with the police, is that a fair statement?

A Correct.

Q Is it your wish to plead guilty here this morning because, in fact, you are guilty of this offense?

A Yes.

Q You understand that Mr. Shane on your behalf could have filed motions to suppress any of the evidence; that is, the physical evidence that was obtained in the case or any statements that you may have made or any of the other evidence obtained by law enforcement, you understand that he could have filed motions to suppress that evidence?

A Yes.

Q And you understand that if the Judge accepts your plea of guilty here this morning and you're sentenced on this offense, there will be no opportunity to review whether or not that evidence was obtained lawfully. Do you understand that?

A Yes.

Q And so, for instance, as we discussed earlier, there will be no right to appeal in this case. Do you understand that?

A Yes.

Q With regard to the issue of your guilt, you understand that?

A Yes.

Q Whereas, had you chosen to, Mr. Shane could have gone before, in the first instance, the Magistrate Judge to determine whether or not the evidence was seized lawfully. And if the Magistrate Judge said, well, yes, that evidence was seized lawfully, you could have then sought to have Judge Doty review that determination and Judge Doty would again look at the evidence to determine whether or not the evidence was seized lawfully. Do you understand that?

A Yes.

Q And if Judge Doty determined that it was seized lawfully, you could have persisted and actually gone to the 8th Circuit Court of Appeals, which presides in St. Louis, and again ask them to review a determination as to whether or not the evidence was seized lawfully. Do you understand that?

A Yes.

Q But if you plead guilty here this morning, you're giving up that right to have any court review whether or not the evidence was seized lawfully by law enforcement, you understand that?

A Yes.

MR. NEWBERRY: Your Honor, I have nothing further at this time.

THE COURT: Mr. Shane, do you have any questions or comments you'd like to put on the record at this point?

MR. SHANE: Not at this point, Your Honor, Mr. Newberry has done a very thorough job.

THE COURT: He's done a good job, but I'm going to ask some questions of you also, Mr. Scurlark. And some of them may even be the same questions

you've already been asked, but I want to make sure for my own purposes of certain things. And the first question I always ask is whether you're here voluntarily, are you?

THE DEFENDANT: Yes.

THE COURT: Nobody has forced you to come here this morning?

THE DEFENDANT: No.

THE COURT: When I say nobody, I mean nobody, including your own counsel, Mr. Newberry, agents that might be working with you or anybody else?

THE DEFENDANT: No.

THE COURT: And in addition, have any promises been made to you other than the promises in the plea agreement?

THE DEFENDANT: No.

THE COURT: Now, I know that you're in custody, but I'm still going to ask you whether you've had any drugs or alcohol in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Are you on any medication whatsoever?

THE DEFENDANT: No.

THE COURT: The reason we ask those questions is, we want to make sure you understand what's going on here. Do you understand what's happening here this morning?

THE DEFENDANT: Yes.

THE COURT: Do you understand why you're here?

THE DEFENDANT: Yes.

THE COURT: And what's going to happen?

THE DEFENDANT: Yes.

THE COURT: One of the things that goes on is all of those rights that are read to you are rights that you would have primarily during a trial. If you plead guilty, there won't be a trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: But as you stand here right now, you can still have all of those rights given to you. In other words, you haven't done anything yet as far as the Court is concerned. So, if in the back of your mind you're saying, I'm not sure I want this deal, maybe I should go to trial, maybe I could win, you still have that right. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Once you say, I'm guilty to me and I accept your plea, all of that goes, you waive it and you give it up. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: There are certain limited rights you have to withdraw from the plea, but they are very limited; they might as well not exist actually. Do you understand that, that once you say I'm guilty, you're probably not going to be able to withdraw from this plea?

THE DEFENDANT: Yes.

THE COURT: It was covered with quite a bit of detail, but you understand that you're going to be sentenced under the Sentencing Guidelines we have as – they are guidelines now, they are not required to be followed, but they are guidelines that the Court is going to follow when it sentences you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Whether you have agreed to something or not, the Court is not bound by that agreement. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In other words, there are certain things that are set forth in this plea agreement that after we go through an investigation that I might not agree with and I'm going to sentence in accordance with what I believe the law to be. Do you understand?

THE DEFENDANT: Yes.

THE COURT: I'm going to try to recognize your agreement, there's no question about that, and I'll probably do that, but if I think it's just illegal, I won't, do you understand?

THE DEFENDANT: Yes.

MR. NEWBERRY: Your Honor, if I might – I suppose I should – I might interrupt, hopefully irrespectively. With regard to the plea agreement, I believe Mr. Shane has crafted this and the Government has agreed that the Court is bound by this plea agreement.

THE COURT: Is this a – I didn't understand that.

MR. NEWBERRY: Yes. And so –

THE COURT: So, if I accept this plea agreement, I'm bound under 11 –

MR. NEWBERRY: It's (c)(1)(C) now, I believe. It used to be 11(e)(1)(C).

THE COURT: Okay, I was going to say 11(e). So, under paragraph 6, you do believe I'm bound, huh?

MR. NEWBERRY: Yes, we do, Your Honor. And so if you were not to accept the plea agreement, then,

Mr. Scurlark would be allowed to withdraw from the plea.

THE COURT: That's a big out. At this point at least, I'm going to decide whether I accept the plea agreement conditionally, and if we're going to go on. If I don't accept the plea agreement at some further point, Mr. Newberry is reminding the Court, because I didn't follow – and you didn't go bling. These are very unusual plea agreements when a Court is bound. Usually it's what I was telling you a minute ago. This is a very unusual plea agreement.

So, it's going to take some future time to decide whether to be bound by it – whether I'll be bound by it. If I do, then I'll do it right in accordance with the plea agreement. If I don't, you then have a chance to back out at that point; you can decide. And, of course, in talking with your lawyer. Okay. I'm sorry if I confused you. A lot of things confusing in this case, Mr. Newberry.

MR. NEWBERRY: It is an unusual case, Your Honor.

THE COURT: It is an unusual case, as you say, and I hope everybody understands that. The final thing is, you can now plead not guilty and stick by that, and you would have all of the rights given to you. We would just ignore the plea agreement, we'd go ahead and have a trial fairly soon. You'd have a speedy trial. Do you understand all of that?

THE DEFENDANT: Yes.

THE COURT: And you're willing to give up all of those rights?

THE DEFENDANT: Yes.

THE COURT: Do you think you are guilty?

THE DEFENDANT: Yes.

THE COURT: Have you answered all of the questions that have been asked you by Mr. Newberry and by the Court truthfully and honestly?

THE DEFENDANT: Yes.

THE COURT: I'm going to ask you then, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: I'm going to put this finding into the record. It is the finding of the Court in the case of the United States versus Wilmer Lee Scurlark, that the defendant is fully competent and capable of entering an informed plea, and that his plea of guilty is a knowing and voluntary plea that is supported by an independent basis in fact containing each of the essential elements of the offense and his plea is, therefore, accepted and the plea agreement is conditionally accepted and he is now adjudged guilty of that offense.

You heard me say that I'm going to accept the plea agreement at this point conditionally, because I am going to have a presentence investigation made. We do have a probation officer that is sitting in the courtroom with us this morning, been listening to everything we've said. I want to make sure you check with her, and Mr. Shane if you would check with her also before you leave if you wish to be present during any of the questioning, make sure that fact is made known also.

After the investigation is made, a written report will be prepared. You will see a copy of that report before I do. Make sure you read it, make sure that it's correct. You tell Mr. Shane if it's not correct, he knows how to go about filing motions or go about filing objections or just making sure that the matter is brought to the Court and so we'll make sure that that's the case.

So, after that is done, the Government gets the same opportunity and when all of that is finished, then we'll have you back here for sentencing. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Anything else that should come before the Court?

MR. NEWBERRY: No, Your Honor.

MR. SHANE: Nothing further, Your Honor.

THE COURT: I'm going to order that the plea agreement now be filed. I don't think there's anything else that should come before the Court and the Court is going to stand in recess. Thank you.

* * *

CERTIFICATE

I, Lorilee K. Fink, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Lorilee K. Fink
Dated: Lorilee K. Fink, RPR-CRR

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	File No. 4:94-103
	)	(DSD/JSM)
Plaintiff,	)	
	)	
vs.	)	
	)	
Wilmer Lee Scurlark,	)	Minneapolis, MN
	)	September 19, 2006
Defendant.	)	1:30 p.m.
	)	

BEFORE THE HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT COURT JUDGE
(SENTENCING)

APPEARANCES

For the Plaintiff: U.S. Attorney's Office
RICHARD NEWBERRY, AUSA
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300 South Fourth Street
Minneapolis, MN 55415

For the Defendant: Shane Law Office
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10 South Fifth Street Minneapolis, MN 55402

Court Reporter: Lorilee K. Fink, RPR CRR
1005 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

(September 19, 2006, 1:30 p.m.)

THE COURT: This is the matter of the United States versus Wilmer Lee Scurlark. May I have appearances.

MR. SHANE: Yes, Robert Shane for the defense, along with Mr. Scurlark who's present before the Court.

THE COURT: Good afternoon.

MR. NEWBERRY: Good afternoon, Your Honor, Richard Newberry appearing on behalf of the Government.

THE COURT: This is a sentencing hearing, but before I get involved in that, I want to have a very slight discussion with counsel concerning the issues here. Now, I know, Mr. Shane, you've had a chance to look at the presentence report, right?

MR. SHANE: Yes, I have.

THE COURT: And you've gone over that with Mr. Scurlark?

MR. SHANE: Yes, we have.

THE COURT: And then you filed objections to the presentence report. And that was I think appropriate on your part. I don't mean to be critical in any way, I think it was probably a good thing to do. But under the plea agreement, if the Court accepts the plea agreement, which I'm inclined to do, because I

think you've worked it out. I tend to believe that plea agreements that are worked out between counsel should be given effect usually, unless there's something wrong or illegal about it. In this case, I don't think there's anything wrong or illegal. I think that the agreement that you reached is rational and reasonable based on what has gone on, the time periods that have gone on and so forth.

The question I have is whether you believe the Court should or must consider your objections to the PSR if I do adopt the plea agreement and carry on through the proceedings using the language of 11(c)(1)(C) ?

MR. SHANE: Your Honor, it's the position of the defense that if the Court accepts the plea agreement between the parties, there's no need to consider the position papers and arguments that were filed with the Court. The reason I did that was, as kind of a safety net in the event the Court did reject the plea agreement, that you understood the arguments and oppositions that we had to the calculations made by Mr. Nikula.

THE COURT: Well, that's exactly what I thought you did. I was kind of assuming that's why you did it, because I tend to do things the same way; that is to assume – assume the worst happens, what's going to happen next. And so I think you did that, and that's what I assumed you did, and so I wasn't surprised. That's what I meant when I said what I did earlier, that I thought I knew why you'd done it.

Mr. Newberry, do you agree with Mr. Shane's comments that it's really not necessary for the Court to going through the usual routine of dealing with the stated objections if I accept the plea agreement?

MR. NEWBERRY: Yes, Your Honor, we agree with that.

THE COURT: Okay. Because I just want to make sure that we have counsel's agreement on that issue, because otherwise I would have covered both. I'm prepared to cover both, but I think, frankly, by covering both, I might say too much and get into things that are still out there and not quite – have not quite been satisfied, because there's some factual issues out there that are still kicking around that I think everybody is a little uncertain of. I didn't want to get into those unless I had to. I would have gone ahead and done that, but let's do it the other way.

So, Mr. Scurlark, I think – do you have anything else you'd like to say, Mr. Shane, about the PSR now that I've kind of indicated what I'm going to do?

MR. SHANE: No further comments, Your Honor. I would like to, when the time is appropriate, make some comments on behalf of my client.

THE COURT: The time is appropriate right now. Thank you.

MR. SHANE: Your Honor, I know you've had a chance to review much of the material in the case. And, of course, the central question that the Court needs to consider when imposing sentence is why did Mr. Scurlark commit the offense? What were the surrounding circumstances that could cause a man to commit a crime of this nature? There's been some great background information about Mr. Scurlark, and I wanted to briefly go through some of those circumstances of his life.

THE COURT: Go ahead.

MR. SHANE: As you know, his life began in South Central LA, probably one of the roughest, most drug infested and violent areas in the United States. This is where he got his beginning, this is where he had his start. All around him are gangs,

gunshots, drug deals, murders, everything that can cause a person to go down the wrong path.

When he was three years old, his father moved out. Mr. Scurlark basically had no one to care for him, no parental guidance, no father figure to point him in the right direction. Both his father and mother are here, by the way, Your Honor, along with their son, Leland, who is an 11-year-old young man who is present here as well.

But this is where he came from. His half-brother was shot dead in the head at age 22. Mr. Scurlark himself was the victim of violence. He was at a party and sustained gunshot wounds to his shoulder. Someone had indiscriminately shot into a home and injured him.

So there was the constant lure of joining a gang. And people attempted to get Mr. Scurlark into a gang, but he always refused. He couldn't understand the logic. He didn't see why a person could express violence towards another person that he didn't even know. So, despite his surroundings, he managed to stay out of gang life. But he was brought in, sucked into this allure of making quick money by selling drugs, and that's where he went off the wrong road. No one was there, his father was not present to care for him. His mother is hard working, but had to work two jobs to feed the family. They grew up poor. So those are the circumstances surrounding the early life of Mr. Scurlark.

The second question the Court really wants answered, is Mr. Scurlark the type of person who is going to commit this type of offense again? And I think the evidence and the character letters show that is certainly not the case. He's been out for a period of 12 years now and lived a law-abiding life. I was so impressed reading those character letters about him; very moving. This man is a skilled painter, he's a

journeyman painter, a skilled carpenter, a mechanic, a landscaper. What he did was replace an illegitimate source of earning income with a legitimate source. He went out and earned money to support his family. That's the most important thing to him.

A period of 12 years passed. When the offense was committed he was 24; he's 37 now. And during that time period, he has changed his life. And, of course, one of the forces behind that change was the wonderful woman he's met, Roshanda Cook (phonetic), who is also present in the white dress here, Your Honor, this afternoon. She's an amazing woman. She's just got her master's degree in child development, believes in education, understands the condition that the black man in modern-day society has to endure. In fact, she wrote her thesis about the Black Male; an Endangered Species. Her knowledge that she possessed was useful in influencing Mr. Scurlark and really providing a moral compass for him to straighten out his life.

They were fortunate enough to have this young son born to them, Leland Scurlark. And I had a chance to speak with him a little bit this afternoon, a very fine young man. I know Mr. Scurlark told me he would like to be an architect some day.

But what Wilmer has done has been involved in his son's life like you're supposed to be. He was a father to his son. I though that letter that the son wrote was moving, that his dad plays basketball with him, snowball fights, taught him how to ride a dirt bike. He's a real dad, and that's what he's all about, he's a human being down under.

He's out there advising people against drugs, against joining gangs. I'd meet him at the jail out at Sherburne County and he's telling me about trying to help people that are there, that want to go out and

commit crimes even though they are incarcerated. And he tries to talk them out of doing that.

He's been involved in kids' sports programs as a mentor and parental person for kids who do not have fathers and has been a positive influence with them.

I was also moved by that letter from the neighbor that spoke highly of what a charitable person he was. This was a single mom and Mr. Scurlark would, when needed, watch her child for her. He would help her buy a car and assist her in any way he could. If someone needed watching over the children, he was there. And, so, he's a charitable person, he goes out of his way to help people not commit the same mistake that he has made in his life.

He does want to get a GED. He's working on his educational skills. Although he didn't graduate from high school, he's been practicing his writing. He writes to his son practically every day and Roshanda Cook helps him with his writing and punctuation and grammar, and I thought the letter he wrote really exemplified that. He's interested in reading and learning. The last time I met with him, he was reading a book entitled, Makes Me Want to Holler. The book is about an African American who was placed in prison, but subsequently turned his life around. I thought, boy, that's appropriate, that's a role model for him, someone for him to follow. And you can see that he needs to be out there with his son so that this cycle of violence and cycle of single parenting does not continue.

Your Honor, I think that society certainly is going to be protected if the Court does not impose a lengthy sentence. It doesn't appear as though he is likely to reoffend. A 12-year period has lapsed and he's been crime free.

I don't think it's necessary to imprison him for a lengthy period of time in order to deter future crime.

He has rehabilitated himself. It's post-conviction rehabilitation – post-offense, rather, rehabilitation. He's certainly demonstrated it.

The character letters were outstanding, especially from the employers. I was impressed particularly with the one who said that he was trustworthy, that he would come – Mr. Scurlark would do some home repair for this individual and he was always on time, had a good attitude, was responsible, respectful, but more importantly, he was trustworthy. That homeowner would give him the key to allow him to go into his house and trusted him that much. That shows rehabilitation.

Your Honor, I think that a lengthy prison sentence is only going to have a negative effect on Mr. Scurlark. He's been in custody now for about six months. He certainly has learned his lesson. A lengthy prison sentence is going to place him back in the same environment that he was able to extricate himself from. You've got your peers are murderers, drug dealers, people who are negative influences on his life. There's gangs present in prison, drugs are rampant. A lengthy sentence destroys self-esteem. I think we've got to build on what he's done for himself to this point. I want the Court to consider that in making your decision today.

It's critical that he really be on the outside as soon as possible. The financial burden on the family is great, Roshanda is having to make the mortgage payments, having to support the son. His economic input is not there. Society and the community needs him, his customers need him, he does excellent work, his employers need him. The community at large, when he does community service needs him, and other children who have no fathers need his help.

Your Honor, with regard to a placement, Mr. Scurlark has requested that he be placed at a loca-

tion entitled Terminal Island in San Pedro, California. He's asking that the Court make a recommendation to the Bureau of Prisons that he be placed there.

With regard to the period of supervised release, we're requesting a period of – minimal period of two years. I don't think that it's necessary for a lengthy supervision for a man who has rehabilitated himself.

With regard to the fine, he has no assets or income at this time. It appears appropriate that the Court, in light of his circumstances, waive the fine.

And in terms of where you begin your sentence, Your Honor, as you know, under the plea agreement he's at a level 33 with a Criminal History of II, places him in a presumptive guideline range between 151 months and 188 months. We're requesting that in light of his post-offense rehabilitation by Mr. Scurlark, that the Court start from the low end of the box at the 151-month mark, and that the variance of 40 percent be granted and calculated from that point. And if the Court sees fit to even go further than the variance agreed to by the state, and I don't know if that's possible, and Mr. Newberry may have a few comments to make about that request, but I feel compelled in light of having gotten to know Mr. Scurlark and his family, what kind of human being he is.

The agreed-upon sentence still amounts to probably six-and-a-half years in prison, six-and-a-half years away from his son who's in the critical stages, just turned 11; six-and-a-half years he'll be 17, 18, by the time Mr. Scurlark is released from prison. But he is needed at home sooner than in six years, Your Honor.

And so, if the Court feels it's appropriate and there are extraordinary factors present in this case to justify a variance, that if you see it as appropriate to even grant an increased variance or perhaps pro-

bation to get this man reunited with his son and his fiance and his family, so that he can be out in the world again doing good for others.

Thank you. That's all I have, Your Honor.

THE COURT: Before you leave the microphone, I just want to check something with your math. Lawyers and judges are inherently bad mathematicians. We wouldn't be here if we were good. But we figured out that a 40 percent variance from the guidelines of 151 to 188, would lead to 91 to 113. Is that the same math you use?

MR. SHANE: Well, I started from the low end of the box I think, Your Honor, yeah.

THE COURT: Well, you see I'm giving you the low end and the high end, right? If we start from the box of 151 to 188, a 40 percent variance from that range would be 91 to 113. Is that what you figure? Because the way you were talking, it didn't sound like it. Is that – Madam Probation Officer, do you agree with the math that I'm reciting?

MS. VALENTO: That's correct, 91 to 113 months, that would equal seven years and seven months. Perhaps defense counsel is –

THE COURT: That's what I was getting –

MR. SHANE: Yeah.

THE COURT: I'm asking the question right now, because you're talking about six-and-a-half years, and it's a little more than that.

MR. SHANE: Yeah. Yeah, I see 91 months would be at the low end of the box. That's right, Your Honor, and then – right, I see that.

THE COURT: Okay. I just wanted to make sure that we're on the same mathematical page.

MR. SHANE: Yes, yeah. I figured with the variance would be 91 months at the low end of the box, less good time, right.

THE COURT: All right. Mr. Scurlark, you get a chance to talk also. You've got a good lawyer, he's made a very impassioned plea for you. You've got a lot of people out there that are supporting you and have done as much as they can in sending the Court letters. But you get a chance to talk now also, so whatever you might want to say is fine.

THE DEFENDANT: I would just like to express my apologies and regret for the charges brought against me. Like I say, it was something that happened 12 years ago and I was 24 years old, very immature at the time.

Since then, I've learned to obey and respect the law. I've learned that hard work and honesty does pay off and has great rewards. I also think that every son needs his father for the love and influence that only a father could give to his son. I know this because I grew up without my father and I had a lot of the wrong influences and lack of discipline as a teenager, which may be the reason why I'm here in this courtroom today. I feel that – I wish things would have been different for me. I wish my father could have been there for me to influence me in the right ways. I just wish things would have been different for me.

I feel that my son – I regret what this has done to my family and my children, especially for my son, because he is now forced to grow up without his father. I feel that he will have to deal with the peer pressure from gangs and all of the wrong influences that he will face as a teenager because he now lives in the same environment, which is just the same as when I grew up as a teen. There's not much difference, not much has changed.

I want more than anything to be there for my children, to influence them and guide them in all of the right directions. For the past 10 to 12 years I have been working as a painter and carpenter in the construction trade. I've grown to love my job because it allowed me to provide for my family financially and earn an honest living. My hard work has made a mark on my community by me giving my all and doing my best, and this situation has forced my family to struggle financially and has caused mental stress also, because I'm not there as a father or as a provider.

I know there are consequences for what I've done, and I'm now 37 years old and I would like to be there for my children to get a second chance at life, because I have worked hard for my family and for my job. And as I approach 40 years old, it would be even harder to have to start all over again with my lack of education. And I just want more than anything to be able to return home and continue to work hard at being a better father, a better businessman, and a good influence to my community, my family and my children, because I now know that I can make a difference in the lives of others by being a good influence to them. Thank you. I'm sorry.

THE COURT: Well, I thank you. And oftentimes we judges learn more from people like you who are telling us about themselves and what's happened. I'm glad you brought up and maybe you didn't make it quite as clear as I'm going to make it, that the people you should apologize to, of course, are not the Court or the Government. You know, the Government does what they have to do because they're forced to. I've sworn to uphold the law. I'm going to do some things that I have to do because that's my job and I must do it.

But those folks sitting back there are the ones, of course, that you should be apologizing to and I hope you have that feeling about, because they are the ones that have suffered and will along with you. And so, that's where it ought to be. And I hope you understand that, too.

Mr. Newberry, you've listened to a lot here without saying a word.

MR. NEWBERRY: I have, Your Honor.

THE COURT: I want to hear from you.

MR. NEWBERRY: I'll try to be brief. I would actually like to start in a somewhat different manner and just suggest that the comments made by counsel and Mr. Scurlark are significant. It is no small matter that Mr. Scurlark does accept responsibility for his actions, albeit 12 years later. And to the extent that he offers some reasons, which may be appropriate for us to consider and I believe they are appropriate to consider. It's also important to recognize that today, in many ways, symbolically is the beginning of his redemption. He can set aside his excuses and move forward. And as you've suggested, an apology to his family is certainly appropriate.

Having said that, this is an unusual case with unusual circumstances, and so we believed that on behalf of the people, the Government was willing to arrive at what we believe is an unusual result. And so rather than seek a sentence in the range of 210 to 262 months, as could be contemplated by one calculation in this case, we believe that a variance was appropriate. And so, the range that was suggested was 151 to 188 with a variance from that of 40 percent or 68 months. And so I intended to stand here and suggest that 188 minus 68 arrived at 120 months, and that that would be the appropriate number.

I understand the Court's acknowledgement and I agreed at one point in my life I intended to be an economist, but my math skills were insufficient, so I did become a lawyer. And so, I don't make light of that – of that fact, Your Honor.

And so we recognize the range as contemplated by the Court. We believe that's appropriate and we have nothing further.

THE COURT: Okay. And so you agree with the math that the probation officer used. I'm not taking any credit for that math at all. We were copying the probation officer's calculation. But I think that's right, isn't it, Mr. Newberry?

MR. NEWBERRY: I do agree that that is – that 40 percent would reflect that – I also probably could

THE COURT: Where would you – where would you have us? Mr. Shane has asked to be put at the bottom. Where would you have us put Mr. Scurlark –

MR. NEWBERRY: Well, I wouldn't necessarily agree that 91 months or the low end is appropriate, but it's certainly the range is reasonable, Your Honor.

THE COURT: Okay. So you'd say that's inappropriate, 91 is inappropriate based on what could have happened here?

MR. NEWBERRY: Yes.

THE COURT: Okay. All right. Well having heard you all, I'm going to say this: That the parties have negotiated a plea agreement pursuant to Rule 11(c)(1)(C) in which they've agreed that a sentence within the range of 91 to 113 months is an appropriate disposition of this case.

Specifically, the parties agree that based upon a Criminal History Category of II and a total offense

level of 33, which results in a sentencing range of 151 to 181 months, a 40 percent downward variance from that sentencing range is appropriate under the facts and circumstances of defendant's case.

And having now reviewed the presentence investigation report, the Court does find that the parties' stipulated disposition of this matter is appropriate and, therefore, the Court now unconditionally accepts the plea agreement, because it is satisfied that the agreement does adequately reflect the seriousness of defendant's offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing. And I believe also that the plea agreement does provide for a reasonable sentence.

What I'm going to do is skip a whole lot of material that I was going to bring out which would be answering the objections to the probation officer's report, because I don't believe it's necessary with the agreement of counsel here today.

I will put on the record, though, this, that under the probation officer's calculation, without the agreement of counsel, this particular offense would have led to the following guideline application. This is what would have been potentially possible: A total offense level of 33, with a Criminal History Category of II, which might have led to imprisonment range of 151 to 188 months, with a supervised release of three years, a fine range of 17,500 to $1 million, a special assessment of $100.

Now the statutes under which the defendant has been convicted set a maximum period of 20 years imprisonment, a three-year term of supervised release, and a maximum fine of $1 million.

Mr. Scurlark, you have been charged in Count 2 of the superseding indictment with possession with intent to distribute cocaine base in violation of 21

United States Code, Sections 841(a)(1) and 841(b)(1)(C), and that's a class C felony.

And based upon your plea of guilty to that charge, it is considered and adjudged that you are guilty of that offense.

And, therefore, it is adjudged that you are committed to the custody of the Bureau of Prisons for a period of 100 months. The Court will recommend that you participate in the 500-hour residential drug treatment program. That has some other benefits to it. I hope Mr. Shane has told you about that. If he hasn't he will. I will also recommend that you be incarcerated in California, and especially if you can be placed in Terminal Island, California, that that recommendation will also be made.

Further, it is ordered that pursuant to 18 United States Code, Section 3583, you are to serve a term of supervised release of three years under the following conditions:

First, you shall not commit any crimes, federal, state or local.

Second, you shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

Third, you shall refrain from possessing a firearm, destructive device or other dangerous weapon.

Fourth, you shall participate in a program for drug abuse as approved by the probation officer. That program may include testing or inpatient or outpatient treatment, counseling or support group. Further, you shall contribute to the costs of such treatment as determined by the probation office copayment program not to exceed the total cost of treatment.

Fifth, you shall be required to undergo mandatory drug testing as set forth by 18 United States Code, Section 3563(a) and 3583(d).

Sixth, you shall cooperate in the collection of DNA as approved by the probation officer and mandated pursuant to 18 United States Code, Sections 3563(a) and 3583(d).

Seventh, you shall comply with the District of Minnesota Offender Employment Policy, which may include participation in training, counseling and/or daily job searching as directed by the probation officer.

Last, you shall participate in an educational program as approved by the probation officer to obtain a high school diploma or a GED diploma.

No fine is going to be imposed, however, pursuant to 18 United States Code, Section 3013, you must pay to the United States a special assessment of $100, which is due immediately.

Now, the reasons for this sentence are that in sentencing the defendant to a term of 100 months, the Court has accepted the parties' negotiated plea agreement which is binding upon the Court pursuant to Rule 11(c)(1)(C).

In adopting the plea agreement, the Court has considered defendant's post-offense rehabilitation efforts and finds that the negotiated disposition is sufficient, but not greater than necessary to deter defendant from future criminal activity and protect the public from further crime.

Furthermore, in light of the considerations set forth in 18 United States Code, Section 3553(a), the sentence imposed is reasonable, appropriately reflects the seriousness of the offense and provides just punishment.

Now a fine outside of the guidelines range, that is no fine is imposed because of defendant's apparent inability to pay a fine due to his lack of assets and pending incarceration. And for those same reasons, the defendant will not be ordered to pay the costs of his incarceration or supervised release.

Mr. Newberry, we still have Counts 1 and 3 outstanding.

MR. NEWBERRY: Your Honor, the Government moves to dismiss those counts at this time.

THE COURT: And without objection?

MR. SHANE: No objection.

THE COURT: That motion will be granted.

Now, Mr. Scurlark, you do have a right to appeal this sentence, and you do have ten days from today to do that, so you talk to your counsel, decide what you want to do. But make sure you do something within ten days or you lose the right. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, if by some chance you can't afford counsel to take an appeal, you may also qualify and have counsel provided for you or have funds provided to you to pay counsel to take an-appeal, and also to pay the costs and expenses of that appeal. Do you understand those rights that you have?

THE DEFENDANT: Yes.

THE COURT: Okay. Now, is there anything else that should come before the Court? Mr. Newberry.

MR. NEWBERRY: Nothing further, Your Honor.

THE COURT: Mr. Shane.

MR. SHANE: Nothing from the defense, Your Honor.

THE COURT: Thank you. The Court is going to stand in recess

CERTIFICATE

I, Lorilee K. Fink, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: /s/

Dated: Lorilee K. Fink, RPR-CRR

143 (2)

No. 09-98

SUPREME COURT, U.S.
FILED
OCT 23 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

WILMER LEE SCURLARK, AKA BONAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
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QUESTION PRESENTED

Whether a district court, pursuant to 18 U.S.C. 3582(c)(2), may reduce a sentence based on a binding agreement between the government and the defendant under Fed. R. Crim. P. 11(c)(1)(C) that a specific sentence or range constitutes the appropriate disposition, when the Sentencing Commission has subsequently reduced the Guidelines range specified in the agreement.

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In the Supreme Court of the United States

No. 09-98

WILMER LEE SCURLARK, AKA BONAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 839. The order of the district court (Pet. App. 8a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 2009. On June 11, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted of possession of crack cocaine with intent to dis-

tribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). The district court sentenced him, pursuant to a sentencing agreement under Fed. R. Crim. P. 11(c)(1)(C), to 100 months of imprisonment. The district court denied petitioner's subsequent motion to reduce the sentence pursuant to 18 U.S.C. 3582(c)(2). The court of appeals affirmed. Pet. App. 1a-7a.

1. In 1994, petitioner was arrested and charged with possession with intent to distribute 218 grams of crack cocaine. He absconded and was a fugitive until 2006. Pet. App. 6a. In 2006, after petitioner was apprehended, he was charged by superseding indictment with attempted distribution of crack cocaine (21 U.S.C. 841(a)(1)), possession with intent to distribute crack cocaine (*ibid.*), and failure to appear (18 U.S.C. 3146(a)(1)). Pet. App. 1a.

Petitioner and the government entered into a plea agreement. Petitioner agreed to plead guilty to possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). In exchange, the government agreed to dismiss the other counts of the indictment, forgo seeking sentencing enhancements, and recommend a 40% downward variance. Pet. App. 1a-2a. The parties also agreed that the ten-year mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1) would not apply. Pet. App. 12a. Pursuant to Fed. R. Crim. P. 11(c)(1)(C),[1] the parties agreed to a sentencing

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[1] Rule 11(c)(1)(C) (slightly modified from former Rule 11(e)(1)(C) (2001)) permits the government in a plea agreement to "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." Fed. R. Crim. P. 11(c)(1)(C).

range (before application of the downward variance) of 151 to 188 months of imprisonment, agreeing that petitioner's offense level (after adjustments) was 33 and that he had a Category II criminal history. Pet. App. 2a.

The district court accepted petitioner's guilty plea and the plea agreement. The court then applied the government's recommended 40% downward variance to the agreed-upon sentencing range, which yielded a sentencing range of 91 to 113 months of imprisonment. The court sentenced petitioner within that range to 100 months of imprisonment. Pet. App. 2a.

2. a. In 2008, petitioner moved for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2). That statute provides that a district court

> may not modify a term of imprisonment once it has been imposed except that * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission * * * the court may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(2). Petitioner argued that he was entitled to the benefit of the crack-cocaine amendments to the Sentencing Guidelines, which retroactively reduced the base offense level for crack-cocaine offenses by two levels. See Pet. App. 2a; Sentencing Guidelines App. C, Amend. 706, § 1B1.10(c).

The district court denied petitioner's motion. The court ruled that it lacked authority to make a sentencing

reduction under Section 3582(c)(2) because petitioner had been sentenced pursuant to a binding Rule 11(c)(1)(C) plea agreement. Pet. App. 8a-10a.

b. The court of appeals affirmed. Pet. App. 1a-7a.

The court explained that the parties had stipulated to a sentencing range in their plea agreement and had agreed to be bound by the terms of Rule 11(c)(1)(C). Once the district court accepted that agreement, the court of appeals reasoned, Rule 11(c)(1)(C) required the court to sentence petitioner pursuant to the terms of the parties' agreement, and "§ 3582(c)(2) became inapplicable because [petitioner's] sentence was based on the agreement and not 'a sentencing range that ha[d] subsequently been lowered by the Sentencing Commission.'" Pet. App. 5a (quoting 18 U.S.C. 3582(c)(2)).

The court of appeals further noted that the "circumstances surrounding this Rule 11(c)(1)(C) plea agreement demonstrate the contractual nature of the agreement and the fact that the sentence was not based on a sentencing range that was subsequently lowered." Pet. App. 6a. The court pointed to the various ways in which the parties arranged to reach a lower sentencing range than otherwise would have applied under the Guidelines, including dismissal of the count that carried a mandatory ten-year minimum sentence, the 40% downward variance, the acceptance of responsibility credit (despite an obstruction-of-justice enhancement), and other favorable Guidelines computations. *Ibid.*

The court of appeals also rejected petitioner's argument that his sentence must have been based on the Guidelines on the ground that the plea agreement specified a sentencing range rather than a particular sentence, because "Rule 11(c)(1)(C) itself provides that parties may agree to 'a specific sentence *or* sentencing

range' and states that courts are bound by those agreements regardless." Pet. App. 6a (quoting Fed. R. Crim. P. 11(c)(1)(C)).

ARGUMENT

Petitioner contends (Pet. 10-25) that the court of appeals erred in holding that 18 U.S.C. 3582(c)(2) did not permit the district court in this case to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. The decision below is correct, and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly determined that 18 U.S.C. 3582(c)(2) does not apply when a defendant has been sentenced pursuant to a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). Section 3582(c) sets forth the basic rule that a district "court may not modify a term of imprisonment once it has been imposed" and then specifies limited exceptions, including "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission * * * if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

Under Rule 11(c)(1)(C), a defendant and the government may agree in a plea agreement "that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." The provision further provides that "such a recommendation or request binds the court once the court accepts the plea agreement." Fed. R. Crim. P. 11(c)(1)(C). Rule 11(c)(4) provides that, "[i]f the court accepts the plea agreement * * *

the agreed disposition will be included in the judgment." Fed. R. Crim. P. 11(c)(4). The district court thus has no authority to modify the sentencing agreement of the parties once it accepts the plea agreement. See Fed. R. Crim. P. 11(c)(1)(C), (c)(3)(A), and (c)(4); see, *e.g.*, *United States* v. *Pacheco-Navarette*, 432 F.3d 967, 971 (9th Cir. 2005) ("[T]he district court is not permitted to deviate from * * * sentences stipulated in [Rule 11(c)(1)(C)] agreements."), cert. denied, 549 U.S. 892 (2006).

Accordingly, in the Rule 11(c)(1)(C) context, the district court imposes a sentence "based on" the agreement of the parties, regardless whether that sentence correlates to the Sentencing Guidelines range. Although the court might consider the applicable Guidelines range in determining whether to accept the plea agreement, see Sentencing Guidelines § 6B1.2(c), that does not mean that the defendant is sentenced "based on" the Guidelines range. See, *e.g.*, *United States* v. *Cieslowski*, 410 F.3d 353, 364 (7th Cir. 2005) ("A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea."), cert. denied, 546 U.S. 1097 (2006). The court may choose to accept a sentence or range specified by the parties' agreement and thereby become bound under the terms of the agreement and Rule 11(c)(1)(C), even if the sentence or range diverges from the Guidelines range. Even where the parties refer to a Guidelines range, as in this case (Pet. App. 6a), they often will negotiate factors relevant to determining that range in order to effectuate a particular sentence length. The parties' agreement as to that sentence or range, once accepted, becomes the control-

ling basis for the court's sentencing decision. The court of appeals therefore was correct to determine that the condition precedent to a Section 3582(c)(2) adjustment—that the sentence be "based on" a Guidelines range (18 U.S.C. 3582(c)(2))—was not satisfied in this case, where the sentence was imposed pursuant to a Rule 11(c)(1)(C) plea agreement.

That conclusion is supported by the purpose of Section 3582(c)(2) and Guidelines § 1B1.10 (the pertinent policy statement). Under those provisions, a court is given discretion to lower a sentence to take into account that a range used in formulating the original sentence was reduced. But the exercise of that discretion would be inconsistent with the effect of Rule 11(c)(1)(C), which eliminates the court's sentencing discretion (except to the extent expressly conferred by the parties) once it accepts a plea agreement. The government will often give up the right to seek a higher sentence in exchange for the certainty of obtaining a specific sentence. The contractual bargain, which became binding on the court after acceptance of the Rule 11(c)(1)(C) agreement, would be negated if Section 3582(c) were interpreted to grant the court discretion to lower the agreed-upon sentence in light of developments not reflected in the parties' agreement.

2. Petitioner argues (Pet. 15-16) that the decision of the court of appeals conflicts with *Gall* v. *United States*, 128 S. Ct. 586 (2007). Specifically, petitioner contends that, "[u]nder *Gall*, *all* sentences must be 'based on' the Guidelines." Pet. 16. That contention lacks merit. In *Gall*, this Court held generally that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether

inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 128 S. Ct. at 591. *Gall* did not involve a Rule 11(c)(1)(C) plea agreement (see 128 S. Ct. at 592-593) or 18 U.S.C. 3582(c). Accordingly, the Court had no occasion to address (even tangentially) the issue in this case.

3. Petitioner alleges (Pet. 11-15) a conflict among the courts of appeals on the question presented. There is no conflict.

All the courts of appeals to have considered the issue have agreed that Section 3582(c)(2) does not permit a district court to reduce a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement. See *United States* v. *Main*, 579 F.3d 200, 203-204 (2d. Cir. 2009); *United States* v. *Sanchez*, 562 F.3d 275, 279-282 (3d Cir. 2009), petition for cert. pending, No. 09-6659 (filed Sept. 23, 2009); *United States* v. *Peveler*, 359 F.3d 369, 378-379 (6th Cir.), cert. denied, 542 U.S. 911 (2004); *United States* v. *Brown*, 71 Fed. Appx. 383, 384 (5th Cir. 2003) (unpublished); *United States* v. *McKenna*, No. 97-30173, 1998 WL 30793, at *1 (9th Cir. Jan. 16, 1998) (unpublished); *United States* v. *Hemminger*, No. 96-2081, 1997 WL 235838, at *1 (7th Cir. May 2, 1997) (unpublished); *United States* v. *Trujeque*, 100 F.3d 869, 870-871 (10th Cir. 1996).[2]

Petitioner erroneously asserts (Pet. 12-14) that the decision in this case conflicts with the Third Circuit's decision in *Sanchez*, *supra*. In *Sanchez*, the defendant

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[2] A panel of the Fourth Circuit had reached a different conclusion, but the panel opinion was vacated when the Fourth Circuit granted rehearing en banc, and the case subsequently was dismissed for mootness. *United States* v. *Dews*, 551 F.3d 204 (4th Cir. 2008), vacated on grant of reh'g en banc, No. 08-6458 (4th Cir. Feb. 20, 2009), dismissed as moot (4th Cir. May 4, 2009).

was sentenced to 120 months of imprisonment for conspiracy to distribute crack cocaine pursuant to a Rule 11(e)(1)(C) (now Rule 11(c)(1)(C)) plea agreement. 562 F.3d at 277. (The Presentencing Report (PSR) had calculated a Guidelines range of 121 to 151 months of imprisonment. *Ibid.*) Notwithstanding a subsequent two-level reduction in offense level in light of the same Guidelines amendment at issue in this case, the court of appeals affirmed the district court's denial of a motion to reduce the sentence. The court of appeals reasoned that the defendant's "sentence was the result of a binding plea agreement and is therefore not subject to reduction under 18 U.S.C. § 3582(c)(2). * * * If 'binding' is to have meaning, it cannot be undone by the discretionary possibility of a different sentence under § 3582(c)(2)." *Sanchez*, 562 F.3d at 279, 282. That holding is completely consistent with the decision of the court of appeals in the instant case.

Petitioner argues that the Third Circuit in *Sanchez* adopted "a case-by-case approach" such that a district court's authority under Section 3582(c)(2) turns on whether it "considered the Guidelines in accepting the plea." Pet. 12-13 (citing *Sanchez*, 562 F.3d at 282 & n.8). But, as the text of the decision makes clear, the Third Circuit's approach is decidedly categorical when a Rule 11(c)(1)(C) plea is involved:

> While it is true that all plea agreements are binding on the parties, only those entered pursuant to what is now Rule 11(c)(1)(C) are binding on the sentencing court. That distinction is significant in the § 3582(c) context, which obliges us to ask what the sentence is 'based on.' Where, as here, the District Court accepted a so-called "C" plea, the answer is simple: the sentence is based on the terms expressly agreed on

> by the defendant and the government. That is what the Rule itself demands.

Sanchez, 562 F.3d at 282 n.8. In any event, petitioner does not and cannot dispute that *Sanchez*, like the decision below and every other court of appeals' decision to have addressed the issue, denied a sentence reduction under Section 3582(c).

Petitioner also erroneously asserts (Pet. 14-15) that the decision in this case conflicts with the Sixth Circuit's decision in *Peveler*, *supra*. In *Peveler*, the defendant and the government entered into a Rule 11(e)(1)(C) (now Rule 11(c)(1)(C)) agreement that specified the applicable offense level (like in this case) and required the government to recommend a sentence at the low end of the Guidelines range. 359 F.3d at 372-373. The district court accepted that agreement and sentenced the defendant accordingly. *Id.* at 373. Based on a subsequent amendment to the Guidelines that reduced the relevant range, the defendant invoked Section 3582(c)(2) and asked the district court to reduce the sentence. The court of appeals held that the district court lacked the authority to do so, agreeing with the reasoning of the Tenth Circuit in *Trujeque*, *supra*, and the Seventh Circuit in *Hemminger*, *supra*—substantially similar to the Eighth Circuit's reasoning below. *Peveler*, 359 F.3d at 377-379. Notably, the Sixth Circuit added that "[t]he fact that the parties in this case specified an offense level under the sentencing guidelines rather than a fixed period of imprisonment * * * is a distinction without a difference in terms of the court lacking power to amend the plea agreement." *Id.* at 378.

Petitioner nevertheless relies (Pet. 14) on a summary sentence in *Peveler* in which the Sixth Circuit stated that "absent an agreement of the parties, the plain lan-

guage of * * * Rule 11(c)(1)(C), generally precludes the district court from altering the parties' agreed sentence under 18 U.S.C. § 3582([c])." 359 F.3d at 379. The court did not indicate what kind of "agreement of the parties" might circumvent the binding nature of a Rule 11(c)(1)(C) sentence or provide any other elaboration. In any event, no such agreement existed in *Peveler* nor exists in this case, and petitioner does not suggest otherwise. Accordingly, that dictum is not implicated here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

WILMER LEE SCURLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF FOR PETITIONER

The Government's brief in opposition does not dispute the exceptional importance of the question presented by this case. Indeed, the Government would be hard pressed to make such an argument, as this issue is squarely presented for hundreds of federal defendants in the wake of the recent revisions to the crack-cocaine Sentencing Guidelines.

In a recent en banc petition, which the Government emphasized had been "personally approved" by the Solicitor General, the Government argued that the same issue presented by this case "involves questions of exceptional importance: the meaning of 18 U.S.C. § 3582(c)(2) and the finality of plea agreements entered pursuant to Fed. R. Crim. P. 11(c)(1)(C)." *See* Gov't Petition for Rehearing En Banc at 3, *United States v. Dews*, vacated opinion reported at 551 F.3d 204 (4th Cir. 2008) (No. 08-6458); *id.* at 11 (explaining that "[m]ore than 600 cases seeking sentence modification based on the crack cocaine sentencing guideline reduction have been filed in the District of Maryland" alone and that there are thousands pending throughout the country).

Despite the undeniable importance of the question presented, the Government contends that certiorari is not warranted because the Circuits have adopted a uniform and "decidedly categorical" (Opp. 9) approach in holding that a district court *never* has the power under 18 U.S.C. § 3582(c)(2) to reduce a sentence resulting from a Rule 11(c)(1)(C) plea agreement.

The Government is mistaken. While the Eighth Circuit has indeed adopted a categorical approach, other Circuits have taken different paths. The Third

Circuit looks to "what the District Court considered in sentencing the defendant." If the court considered the Guidelines, the sentence may be reduced. *See United States v. Sanchez*, 562 F.3d 275, 282 (3d Cir. 2009). The Sixth Circuit, on the other hand, permits sentence reductions in Rule 11(c)(1)(C) cases if there had been "an agreement of the parties." *See United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004). These approaches are in stark conflict with the approach followed by the Eighth Circuit, which holds that a district court may *never* reduce a sentence arising from a Rule 11(c)(1)(C) agreement, regardless of what the district court considered in imposing the sentence or what bargain the parties may have once struck.

In fact, the conflicts in the Circuits have recently been compounded. The Tenth Circuit, in *United States v. Cobb*, --- F.3d ---, 2009 WL 3418214 (10th Cir. Oct. 26, 2009), has squarely held that a district court *does* have the power under § 3582(c)(2) to reduce a sentence in cases where there was a Rule 11(c)(1)(C) plea agreement if the plea agreement linked the sentencing disposition to the Guidelines. The Tenth Circuit reversed the district court's holding that it lacked jurisdiction to reduce the sentence and remanded for consideration of the defendant's § 3582(c)(2) motion. In fact, the Tenth Circuit expressly acknowledged that its decision conflicts with the Eighth Circuit's holding in this case. *See* 2009 WL 3418214, at *4 (recognizing circuit split and citing *United States v. Scurlark* as a "*But see*").

The Tenth Circuit's ruling only confirms what was previously clear: certiorari is warranted to resolve the conflicting approaches in the lower courts and to answer what even the Government concedes is a recurring question of enormous importance. Un-

der the current state of affairs, defendants in the Third Circuit are eligible for sentence reductions if they can show the district court considered the Guidelines in approving the plea agreement and imposing the sentence; in the Sixth Circuit, defendants are eligible if at the time of their plea they had an agreement allowing for future sentence reductions; and in the Tenth Circuit, defendants are eligible if they can show that their plea agreement linked their sentence to the Guidelines. But in the Eighth Circuit, defendants are simply out of luck. These would be intolerable conflicts in any area of federal law, but they are *particularly* intolerable in the area of sentencing, where this Court has emphasized the importance of "secur[ing] nationwide consistency." *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

This Court should grant review.

I. THE CIRCUITS HAVE ADOPTED CONFLICTING APPROACHES TO THE QUESTION PRESENTED

The Government errs in denying the existence of a conflict.

1. As an initial matter, there can be no dispute that the Tenth Circuit's decision is in direct conflict with the Eighth Circuit's decision in this case. *Cobb* is identical to this case in all relevant respects: the defendant pleaded guilty, was sentenced after entering into a Rule 11(c)(1)(C) agreement, and later moved for a sentence reduction under § 3582(c)(2) based on the recent amendment to the crack-cocaine Guidelines. The district court held that it lacked jurisdiction to reduce the sentence because the sentence had been "based on" the plea agreement rather than the Guidelines.

The Tenth Circuit reversed, holding that the sentence had been "based on" the Guidelines because the "sentencing disposition was tied to the guidelines at every step." 2009 WL 3418214, at *3. The court explained that "the parties' negotiations and the stipulated sentence focused on the later-lowered sentencing range." *Id.* Moreover, "the parties expected the district court to independently determine and consider the applicable guidelines range in imposing the sentence — and the court did so." *Id.* at *4. Therefore, the Tenth Circuit held, the sentence stipulated in the Rule 11(c)(1)(C) plea agreement had been "based on" the Guidelines. The court reasoned that "sentences need not be based solely" on the Guidelines "to fall within the reach of § 3582." *Id.* Rather, the statute applies to any sentence that is "based in any way on a qualifying sentencing range. No other connection is required." *Id.*

Whereas the Eighth Circuit held here that a Rule 11(c)(1)(C) sentence can never be "based on" the Guidelines, Pet. App. 3a-5a, the Tenth Circuit held that "[i]t is simply unrealistic to think that the applicable guideline range is not a major factor (if not *the* major factor) in reaching a stipulated sentence." 2009 WL 3418214, at *5 (emphasis in original). In fact, the Tenth Circuit expressly acknowledged that its holding conflicted with the Eighth Circuit's in this case. *Id.* at *4.

2. The Government is wrong in contending that the Third Circuit's decision in *United States v. Sanchez*, 562 F.3d 275 (3d Cir. 2009), does not conflict with the Eighth Circuit's decision below. According to the Government, "the Third Circuit's approach is decidedly categorical" in that it does not depend on what the district court considered in imposing the sentence. Opp. 9. But the Government's reading

cannot be reconciled with the text of the Third Circuit's opinion. The Third Circuit held that a sentence is "based on" "*what the District Court considered* in sentencing the defendant." 562 F.3d at 282 (emphasis added); *see also id.* at 282 n.8 ("Sanchez's sentence is 'based on' whatever the District Court considered in imposing it . . . .").

In fact, the Third Circuit emphasized that the district court "stated that it was departing from the Guidelines range due to the binding plea agreement," and "there [was] nothing in the record to support [the defendant's] assertion that the parties based the [sentence] on a Guidelines calculation." *Id.* at 277, 282. Indeed, the parties had apparently never even reduced their plea agreement to writing, but had simply presented the district court with a proposed sentence. *Id.* at 277, 280. Accordingly, the Third Circuit could only "speculate about how they came to that number." *Id.* at 282.

Thus, it is hardly surprising the Third Circuit would conclude, in light of its understanding of § 3582(c)(2), that *that particular plea agreement* was not "based on" the applicable sentencing range because there was no evidence that it referred to the Guidelines or that the district court considered the Guidelines in approving the agreement and imposing the sentence. It follows that if the parties *had* based the sentence on a Guidelines calculation, the district court naturally would have "considered" the Guidelines in sentencing Sanchez, and he therefore would have been eligible for a reduction.

Under the Third Circuit's approach, Mr. Scurlark would have been eligible for a sentence reduction, as the record in this case is replete with evidence that the district court based his sentence on the Guide-

lines. The plea agreement stated that Mr. Scurlark "[would] be sentenced in accordance with the applicable Sentencing Guidelines" and set forth the parties' view as to how the Guidelines should be applied. Pet. App. 13a. And during the plea hearing, the district court emphasized that portion of the agreement, reviewed the presentence investigation report, and then accepted the agreement, concluding that the proposed sentence was "appropriate." Pet. App. 51a-52a.

The Ninth Circuit takes an approach that squares with the Third Circuit's approach (and conflicts with the Eighth Circuit's approach). In *United States v. Bride*, 581 F.3d 888, 891 (9th Cir. 2009), the court declined to adopt a categorical rule and instead held that it is "the terms of the plea agreement [that] are key to determining whether the defendant's sentence was, in fact, based on" the Guidelines. Thus, in the Ninth Circuit as well as the Third Circuit, Mr. Scurlark's plea agreement — which expressly incorporated the Guidelines — would clearly have been "based on" the Guidelines, contrary to the conclusion reached by the Eighth Circuit.

3. The Government concedes, albeit grudgingly, that the Sixth Circuit follows a different approach than those of the Third and Eighth Circuits. Opp. 10 (the Sixth Circuit and Eighth Circuit approaches are "substantially similar"). Indeed, in *United States v. Peveler*, 359 F.3d 369, 379 (6th Cir. 2004), the Sixth Circuit explicitly *rejected* a categorical approach, explaining that a district court may reduce a Rule 11(c)(1)(C) sentence if there has been "an agreement of the parties." There is no possible way to reconcile the Sixth Circuit's holding with the decision below, which admits of *no* exceptions.

The fact that the Sixth Circuit "did not indicate what kind of 'agreement of the parties' might" suffice (Opp. 11) is completely irrelevant to whether its approach conflicts with those of other Circuits. The quoted language reinforces that certiorari is warranted because it demonstrates how some courts are permitting the parties to preserve the district court's power to reduce a sentence by agreement, while others foreclose it entirely.

4. Finally, the Government argues that in all the cases cited in the petition, the courts denied the request to reduce the sentences. Opp. 10. Apart from no longer being true after *Cobb*, it obviously does not mean that the courts' approaches are consistent with one another, and as shown above, they are not. The Circuits have staked out differing and conflicting approaches to the threshold question of eligibility, as have the district courts, many of which have followed the Tenth Circuit's reasoning and relied on § 3582(c)(2) to reduce sentences imposed pursuant to Rule 11(c)(1)(C) plea agreements. *See, e.g.*, *United States v. Allen*, 2009 WL 961468, at *3-4 (N.D. Cal. Apr. 8, 2009); *United States v. Pichon*, 2009 WL 1076709, at *1 (E.D. La. Apr. 16, 2009); *United States v. Coleman*, 594 F. Supp. 2d 164, 168 (D. Mass. 2009).

II. THE DECISION BELOW ALSO CONFLICTS WITH *GALL*

In *Gall v. United States*, 128 S. Ct. 586, 596 (2007), this Court held that "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range. . . . [T]he Guidelines should be the starting point and the initial benchmark." *Id.* (emphasis added). The Court made no exception for convictions reached by plea

agreement, nor does the Department of Justice, *see, e.g.*, Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors (Jan. 28, 2005), http://www.justice.gov/dag/readingroom/memo-01282005.pdf.

The Government insists that the decision below does not conflict with *Gall*, reasoning that a sentence is not "based on" the Guidelines just because a district court considered the Guidelines and used them as a benchmark in determining whether to accept a Rule 11(c)(1)(C) agreement, as the district court did here. Opp. 6-8.

The Government is mistaken. As a matter of plain English, a sentence is "based on" the Guidelines when the district court uses them as a "benchmark" — as district courts *must* do under *Gall*. To be sure, a district court may take into account other considerations, but the statute does not say that the sentence must be *solely* "based on" the Guidelines. Indeed, if the Government were correct, *no* sentence would ever be "based on" the Guidelines because *Gall also* requires sentencing courts to look *beyond* the Guidelines in every case. *See* 128 S. Ct. at 596 (Guidelines "are not the only consideration" in sentencing).

The Eighth Circuit and the Government are wrong to interpret the "based on" language in § 3582(c)(2) as Congress' attempt to draw a distinction between sentences that are imposed through plea agreements and those that are not. The Sentencing Commission has explained that the purpose of the "based on" requirement is to ensure that § 3582(c)(2) is applied to cases where "the guideline range applicable to [the] defendant has subsequently been lowered as a result of" a retroactive amend-

ment, such as Amendment 706. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(a) (2008). Thus, an individual convicted of crack-cocaine trafficking is eligible for a reduction only if he was sentenced under § 2D1.1 (the Guideline that was amended), rather than under, say, § 4B1.1 (the "career offender" Guideline that was not amended). *See, e.g.*, *United States v. Martinez*, 572 F.3d 82, 85 (2d Cir. 2009). In short, the "based on" language commands courts to focus on the particular Guideline under which the defendant's sentencing range was determined — *not* on whether the sentence was imposed through a plea agreement. Here, because Mr. Scurlark's range was calculated under § 2D1.1, and because Amendment 706 to § 2D1.1 is "an amendment listed in [§ 1B1.10(c)] that lowers the applicable guideline range" for him, his "[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered." U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 cmt. 1 (2008).

The Government ignores all of this, contending that once a court accepts a sentence specified in a Rule 11(c)(1)(C) plea agreement, the court "thereby become[s] bound under the terms of the agreement and Rule 11(c)(1)(C)." Opp. 6. But every sentence is "binding" once imposed. The only difference under Rule 11(c)(1)(C) is that the court is "bound" by law to allow the defendant to withdraw his plea if it decides that the recommended sentence is inappropriate. If it decides instead to accept the agreement of the parties as an appropriate disposition, which almost always is the case, there is no difference at all between an 11(c)(1)(C) agreement and all the other types of plea agreements that the Government concedes should qualify for sentence reductions.

The Eighth Circuit's decision is wrong on the merits and perpetuates the very disparities that § 3582 and the recent amendments to the Guidelines were intended to correct. As the Tenth Circuit explained, "nothing in the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefitting from a favorable retroactive guideline amendment." *Cobb*, 2009 WL 3418214, at *4. Accepting the Government's interpretation of the statute would have the perverse result — and one directly contrary to congressional intent — of "leav[ing] defendants who pled guilty before the effective date of the [crack-cocaine] amendment with higher sentences than those who pled guilty afterward because the post-amendment pleas and plea negotiations are based on the lower, modified sentencing ranges." *Id.* at *5. The consequence is that defendants, like Mr. Scurlark, who entered Rule 11 pleas before the effective date of the amendment will be "left serving greater sentences on the now-rejected grounds of the 100-to-1 powder-to-crack cocaine ratio." *Id.*

As the Government concedes (*supra* at 1), thousands of these cases are pending throughout the country. Accordingly, there is no reason to permit this circuit split to become more entrenched and to deny individuals the opportunity to request the sentence modifications that Congress and the Sentencing Commission intended to make available. The question is cleanly presented here and this Court should grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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